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RECORD, CASE NO. 15127.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1157.

JOHN W. NOBLE, SECRETARY OF THE INTERIOR, AND THOMAS H. CARTER, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

THE UNION RIVER LOGGING RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 7, 1892.

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INDEX.

	Original.	Print.
Caption	*a*	1
Bill of complaint	1	1
Order that case be heard in general term in first instance	9	5
Subpœna and return	10	6
Appearance for defendants	11	6
Answer	12	7
Exhibit A.—Certified copy of decision of Acting Secretary Chandler, June 2, 1891	15	8
Exhibit B.—Certified copy of motion for review	26	18
Opinion of Mr. Justice James	30	20
Decree	41	26
Clerk's certificate	42	27

a IN THE SUPREME COURT OF THE UNITED STATES.

October term, 1892.

No. .

JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and Thomas H. Carter, Commissioner of the General Land Office, appellants,
vs.
THE UNION RIVER LOGGING RAILROAD COMPANY, appellee.

Appeal from the supreme court of the District of Columbia.

THE UNION RIVER LOGGING RAILROAD COMPANY
vs.
JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and Thomas H. Carter, Commissioner of the General Land Office.
In equity. No. 13503.

Be it remembered, That in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 In the supreme court of the District of Columbia, the day of September, A. D. 1891.

[Filed November 3, 1891.—J. R. Young, clerk.]

THE UNION RIVER LOGGING RAILROAD COMPANY
vs.
JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and Thomas H. Carter, Commissioner of the General Land Office.
No. 13503.

To the supreme court of the District of Columbia, holding an equity court:

The plaintiff states as follows:

1. It is a corporation created, organized, and doing business under statutes of the Territory of Washington, as more particularly set forth herein below, and it brings this suit in its own right.

2. The defendants are both citizens of the United States and residents of the District of Columbia, and are made parties to this action in their official characters, respectively, as above designated.

3. By section 2421 of chapter 185 of the code of the said Territory, adopted in 1881, it is provided that "corporations for * * * the purpose of building, equipping, and running railroads or engaging in any other species of trade or business may be formed according to the provisions of this chapter."

4. Such provisions, by section 2422, are as follows:

"Any two or more persons who may desire to form a company
2 for one or more of the purposes specified in the preceding section shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of deeds, and file one of such articles in the office of the secretary of the Territory and another in the office of the county auditor of the county in which the principal place of business of the company is intended to be located, and retain the third in the possession of the corporation. Said articles shall state the corporate name of the company, the object for which the same shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years, the number of shares of which the capital stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for such length of time (not less than two nor more than six months) as may be designated in such certificate, and the name of the city, town, or locality and county in which the principal place of business of the company is to be located. Amendments may be made to the articles of incorporation by supplemental articles executed and filed the same as the original articles."

5. Accordingly, upon the 20th day of March, 1883, John McReavey, Edwin McReavey, and John Latham, at that time citizens and residents of the said Territory, made and subscribed in triplicate and upon the next day duly filed in the public offices designated as above, articles of incorporation duly complying with all the requirements of the said statute and providing, amongst other things, for a company, to be named "The Union River Logging Railroad Company," which was to exist for fifty years, and have a capital stock amounting to $50,000, in shares of $100 each, and whose business and objects were to be "the building, equipping, running, maintaining, and operating of a railroad for the transportation of saw-logs, piles, and other timber, and wood and lumber, and to charge and receive compensation and tolls therefor," and which was "to run from tide water in Lynch's Cove, at the head of Hood's Canal, in said Mason
County, and running thence in a general northeasterly direction, by
3 the most practicable route, a distance of about ten miles, more or less, to a point at or near the northeast corner of township twenty-four north, of range one east of the Willamette meridian, and generally to do all things necessary or convenient for the accomplishment of the objects above specified."

6. Immediately thereafter the capital stock of the company was subscribed and the latter was duly organized, and thereupon proceeded by degrees to construct and equip a railroad extending from tide water in Lynch's Cove, in all some four miles, along the line above mentioned and over the same, to transport saw-logs and other lumber and timber, as authorized and required by law.

7. Upon the third day of February, 1886, the provisions of section 2421 (above) were amended by the legislative assembly of the Territory so as to extend these to other corporations as well, and a proviso was added "that no such corporation shall commence business or institute proceedings to condemn land for corporate purposes until the whole amount of its capital stock has been subscribed" (Laws of 1885–'6, p. 84); but in no respect then or since have the provisions of the Code of 1881 first above quoted been changed, so far as the plaintiff is informed and believes.

8. Upon the 29th day of December, 1885, Cyrus Walker, William Walker, Daniel B. Jackson, and Edwin G. Ames, then citizens and residents of the said Territory, purchased of its then stockholders the whole capital stock of said company, and thereupon took control of its franchises, property, and business.

9. Upon the 14th day of August, 1888, the stockholders last named executed, and upon the 17th day of the same month filed, under section 2422 above, supplemental articles of incorporation intended to enlarge the scope of its business and duties to the public.

4 10. Such articles specified, as amongst the many objects of the company thereafter, the following:

"First. To construct and equip a railroad and telegraph line from a convenient point on tide water on Lynch's Cove, at the head of Hood's Canal, in Mason County, Washington Territory, and running thence in a general northeasterly direction by the most practicable route to a convenient point on tide water on Dye's Inlet, in the county of Kitsap, in said Territory; and also a branch from said line, at some convenient point thereon between said Lynch's Cove and Dye's Inlet, and running thence in a general northerly direction by the most practicable route to or near the town of Seabeck, on Hood's Canal, in said county of Kitsap; and also a branch from some convenient point on the line of said road between said Lynch's Cove and Dye's Inlet and running in a general northeasterly direction by the most practicable route to tide water at or near Port Orchard, in said county of Kitsap; and also to construct and equip such other branches to said railroad and telegraph line as may be necessary for the proper and profitable management or extension of the business of said corporation.

"Second. To maintain and operate said railroad and branches and carry freight and passengers thereon and receive tolls therefor.

* * * * * * *

"Seventh. To engage and carry on a general logging business and provide for the cutting, hauling, transportation, buying, owning, acquiring, and selling of all kinds of logs, spars, piles, poles, lumber, and timber.

"Eighth. To carry on any business, trade, manufactories, and mercantile pursuits for which a private corporation may be formed under the laws of Washington Territory.

"Ninth. And generally to do all other things necessary and proper for the accomplishment of the objects above specified."

11. In the spring of the year 1889 the plaintiff proceeded to extend its line of road and to reconstruct and to re-equip the same so as to enable it to discharge its new duties: In particular, it constructed

5 its line for three miles beyond the point to which it had previously extended. It located at intervals a better line of road, made and ballasted a new road-bed of standard gauge, and substituted steel rails and another locomotive in place of those rails and equipments which had been sufficient for its limited purposes, as specified in the original articles.

12. During the fall of 1888 the attention of the plaintiff was called to the fact that the act of Congress of March 3, 1875 (18 Stats., page 482), required that any railroad company that might desire to avail itself of the grant of a right of way and other privileges over public lands therein

mentioned should previously file with the Secretary of the Interior a copy of its articles of incorporation, together with due proofs of its organization.

13. Thereupon, on the 5th of January, 1889, it filed with the register of the land office at Seattle, in accordance with the directions of a circular for that purpose issued by the Secretary of the Interior on the 7th of November, 1879, the following papers, duly certified and sworn to, viz: (1) A copy of its articles of incorporation; (2) a copy of the Territorial law under which the company was organized; (3) a certificate of the secretary of the Territory that the articles of incorporation had been filed in his office, with the date thereof; (4) an official certificate by the secretary of the company of its organization and of the copy of the articles filed with the Secretary of the Interior, and (5) a true list of the names and designation of its respective officers at that date, and also a map showing the termini of the road, its length, and its route over the public lands according to the public surveys.

14. Upon the 10th day of January, 1889, the register at Seattle transmitted such papers to the Commissioner of the General Land Office,
6 and he in turn, upon the 28th of that month, transmitted them to the Secretary of the Interior, at the same time approving of them and recommending that they be received and placed upon file. Upon the 29th of the same month they were approved in writing by the Secretary of the Interior—at that time William F. Vilas, esq.—and were ordered to be filed. Accordingly, they were at once filed, and the plaintiff was notified thereof.

15. Upon the 13th of June, 1890, a copy of an order by John W. Noble, esq., Secretary of the Interior, was served upon the plaintiff, directing it to show cause why the above "approval of its articles of incorporation and maps of definite location should not be revoked and annulled."

16. Thereupon the plaintiff, protesting expressly at the same time that such revocation and annulment was beyond the power of the Secretary to effect, showed cause as directed; but, nevertheless, upon the 2d day of June, 1891, George Chandler, esq., then the acting Secretary of the Interior, made such rule absolute and ordered "that the approval of the Secretary of the Interior, dated on the 29th day of January, 1889, of the maps of definite location or profile of the Union River Logging Railroad Company be, and the same is hereby, annulled, cancelled, set aside, and held for naught," and directed the Commissioner of the General Land Office "to carry out this order by causing it to be entered upon the appropriate plats and records of his office and the proper local land office."

17. The defendants approve of the above order of June 2, 1891, and are about to carry it out.

18. The plaintiff is advised and believes that, immediately upon the execution of the order of the 29th of January, 1889—that is, upon the 4th day of February, 1889, or before, an interest in the right of way
7 and other privileges conferred by the act of March 3, 1875, and defined by the map then filed, became vested in it, so that thereafter it was not within the power of the then Secretary or of any of his successors or of any officer of the Government effectively to revoke such approval or to revoke or injuriously affect the right of way or privileges

secured to it thereby and by its having then filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same."

19. The execution of the order of June 2, 1891, will throw a cloud upon and otherwise practically embarrass the right so vested as above, and that consequently it is entitled in this court to an order enjoining such execution.

Wherefore plaintiff prays—

1st. That, so far as the said order of June 2, 1891, purports to revoke and annul the approval of the plaintiff's right-of-way maps made January 29, 1889, it may be declared void and of no effect.

2d. That it may please the court to grant to the plaintiff a writ of injunction restraining the defendants from executing said order of June 2, 1891, and from in any way molesting the plaintiff in the enjoyment of the right of way and other privileges secured to it by the approval and order of January 29, 1889.

3d. For such other and further relief as to the court may seem proper in this behalf.

4th. That writs of subpœna may be directed to the said John W. Noble, Secretary of the Interior, and Thomas H. Carter, Commissioner of the General Land Office, commanding them, &c.

8 And your petitioner will ever pray, &c.

E. G. AMES,
Vice-President of the Union River Logging R. R. Co.

STATE OF WASHINGTON,
County of Kitsap, ss:

Now comes E. G. Ames, vice-president of the Union River Logging Railroad Company, and upon oath states that he has read the foregoing petition or complaint and knows the contents thereof; that the things therein stated of his own knowledge are true and the things stated upon information are true, to the best of his knowledge and belief; that the president of said company is not now in said State of Washington.

E. G. AMES,
Vice-President.

Subscribed and sworn to before me this 12th day of October, 1891.

[Seal of C. R. Cranmer, notary public.]

C. R. CRANMER,
Notary Public in and for State of Washington, residing at Pt. Gamble.

In our opinion, upon the case laid before us, there is good ground for filing the above suit in the manner in which it is framed.

PHILLIPS & MCKINNEY,
Attorneys for the Petitioner.

OCTOBER 31, 1891.

9 [Endorsed:] 13,503. Eq. doc. 33. In the supreme court of the District of Columbia. The Union River Logging Railroad Co. vs. John W. Noble, Secretary of the Interior, and Thomas H. Carter, Commissioner of the General Land Office. Bill for injunction. Filed Nov. 3, 1891. J. R. Young, clerk.

[Endorsed:] November 6, 1891. The within bill for an injunction is hereby certified to the general term, to be there heard in the first instance. W. S. Cox, justice. M. 33, p. 354. Filed Nov. 6, 1891. J. R. Young, clerk.

10 In the supreme court of the District of Columbia, Novr. 3, 1891.

THE UNION RIVER LOGGING R. R. CO., complainant, *against* JOHN W. NOBLE, SECY., &C., ET AL., DEFENDANT. } No. 13503. Equity Docket 33.

The President of the United States to John W. Noble, Secy., &c., Thomas H. Carter, com., &c., defendants:

You are hereby commanded to appear in this court at its first special term, occurring ten days after service of this subpœna, and answer the exigency of the original bill, under pain of attachment, and such other process of contempt as the court shall award.

Witness: E. F. Bingham, chief justice.

[SEAL.]

J. R. YOUNG,
Clerk.
By M. A. CLANCY,
Asst. Clerk.

Memorandum: That the defendant herewith served is to enter their appearance in this suit in the clerk's office on or before the day at which this writ is returnable, otherwise the bill may be taken for confessed.

(Endorsed:) No. 13503. Equity Docket 33. Spa. to ans. O. B. Union River Logging R. R. Co. vs. John W. Noble, Secy., et al. Subpœna to answer. Issued Novr. 3, 1891. Returned Novr. 10, 1891. Served Thomas H. Carter, commr., &c., Novr. 5th, 1891, and John W. Noble, Secretary, &c., Novr. 6th, 1891. D. M. Ransdell, marshal. 11 Phillips & McKenney. Filed Nov. 30, 1891. J. R. Young, clerk.

DEPARTMENT OF JUSTICE,
Washington, November 30, 1891.

THE UNION RIVER LOGGING COMPANY *vs.* JOHN W. NOBLE, SECTY., &C., &C., ET AL. } Equity. No. 13503.

To the Clerk of the Supreme Court, D. C.:

DEAR SIR: Please enter my appearance as counsel for the defendants in the case above entitled.

Very respectfully, &c.,

WM. A. MAURY,
Asst. Atty. Genl.

(Endorsed:) 13503. Equity. Union River Logging R. Rd. Co. vs. Secy. of Interior and Comr. G. Land Office. Order to enter appearance for defts. Filed Nov. 30, 1891. J. R. Young, clerk.

12 Supreme Court of the District of Columbia.

[Filed March 19, 1892—J. R. Young, clerk.]

THE UNION RIVER LOGGING RAILROAD COMPANY
vs.
JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and THOMAS H. CARTER, Commissioner of the General Land Office.
} Equity. No. 13503.

The joint and separate answer of John W. Noble, Secretary of the Interior, and Thomas H. Carter, Commissioner of the General Land Office, to the bill of complaint against them, filed and exhibited in this honorable court.

These defendants, answering, say that they admit their citizenship and residence as stated in paragraph 2 of the bill, and that they believe that the matters and things stated in the other paragraphs of the bill, from one to seventeen, inclusive, are truly stated.

As to the remaining paragraphs of the bill, these respondents say that it became known to them that the complainant company was not engaged in the business of a common carrier of passengers and freight at the time of its application for admission to the privileges of the act of Congress of March 3, 1875, chapter 152, but that it was engaged at that time in the transportation of logs for the private use and benefit of the several persons composing the said company; and thereupon your respondent, John W. Noble, Secretary of the Interior, being advised that a railroad company carrying on a merely private business was not such a railroad company as is contemplated by the said act of Congress, deemed it his duty to take proper steps to vacate and annul the action of the Honorable William F. Vilas, Secretary of the Interior, of January 29, 1889,
13 approving the application of the complainant company under the said act of Congress, and the maps of definite location accompanying the same; and to that end this respondent caused notice to be given to the complainant company to show cause why the said action of the Secretary of the Interior should not be vacated and annulled.

And respondent further saith that, after cause shown by the complainant company, the Honorable George Chandler, Acting Secretary of the Interior, entered the order of June 2, 1891, referred to in the bill, annulling, cancelling, setting aside, and holding for naught the former action of the Secretary of the Interior approving the application of the said company as aforesaid, as more fully appears by a copy of the said order, herewith filed, marked Respondents' Exhibit A, to which reference is hereby made.

And respondent saith that the said order of the Acting Secretary of June 2, 1891, received the approval of respondent, and that respondent directed his corespondent, the Commissioner of the General Land Office, to carry the said order into effect.

And respondent further saith that he is advised that it was his right and his duty to revoke and annul the action of his predecessors in approving the application of the complainant company, as having been made improvidently and on false suggestions and without authority under the said

statute; wherefore these respondents respectfully say that the bill of complaint presents no case for the interference of this honorable court, by the writ of injunction or otherwise.

And respondents further say that after the entry of the said order of June 2, 1891, the complainant filed a motion for the review and reversal of the same by the Secretary of the Interior, as will more fully appear by a copy of the said motion and the errors assigned therewith, herewith filed and marked Respondents' Exhibit B.

And respondents, further answering, say that the said motion is still pending and undecided.

14 And these respondents, having fully answered the said bill, pray to be hence dismissed with their proper costs in this behalf sustained.

(Signed) JOHN W. NOBLE,
Secretary of the Interior.

(Signed) THOMAS H. CARTER,
Commissioner of the General Land Office.

DISTRICT OF COLUMBIA,
City of Washington, to wit:

Personally appeared before me, the undersigned, a notary public in and for the city and District aforesaid, John W. Noble, Secretary of the Interior, and Thomas H. Carter, Commissioner of the General Land Office, and made oath in due form of law that the matters and things stated in the aforegoing answer are true in so far as stated of their own knowledge, and that they believe them to be true in so far as stated on the information of others.

In witness whereof I have hereto set my hand and seal of office this 17th day of March, in the year 1892.

[L. S.] (Signed) EDWARD M. DAWSON,
Notary Public.

(Endorsed:) 13503. Equity. Supreme court Dist. of Columbia. The Union River Logging Railroad Company vs. John W. Noble, Secretary of the Interior, and Thomas H. Carter, Commissioner of the General Land Office. In equity. No. 13503. Answer of the defendant. Wm. A. Maury, Ass't Att'y Gen'l. Filed March 19, 1892. J. R. Young, clerk.

15 *Respondent's Exhibit A, filed March 19, 1892.*

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Mch. 17, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original of record in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interior.

[Seal Department of the Interior.]

16 *Acting Secretary Chandler to the Commissioner of the General Land Office, June 2, 1891.*

I have considered the matter of the Union River Logging Railroad Company on rule to show cause why the action of the Department in approving its map of definite location, under the act of March 3, 1875 (18 Stats., 482), should not be revoked. In order to arrive at a full understanding of the matter, it appears to be necessary to commence with the facts and circumstances under which your office became aware of the existence of the respondent company.

On the 29th day of August, 1886, John McKenna, a claimant under the preëmption law, complained to the Commissioner of the General Land Office that the respondent company was then trespassing upon his claim, which embraced the E. ½ SW. ¼ and W. ½ SE. ¼ of sec. 34, T. 24 N., R. 1 W., Willamette meridian, Seattle, Washington, by cutting a right of way through his claim, and by cutting valuable timber upon the public lands along its roadway.

Thereupon, the matter was referred to Special Agent Carson for investigation. October 14, 1888, Agent Carson made his report, showing the incorporation of the respondent company in March, 1883, and the building of about four-and-a-half or five miles of its road, and that the first of the year of 1888 said road changed hands, and was at the date of the report owned by the "Puget Mill Co.;" that the route they were taking through McKenna's claim was a very great injury to it.

The records of the General Land Office were examined, and no record that such a company existed found there. The case was then referred to Special Agent Byrne, who investigated it, and on the 19th day of November, 1888, made his report showing the respondent company to be wilfully trespassing upon the lands described in McKenna's complaint and the public lands in the vicinity, and recommended the prosecution of the respondent company "as any other trespasser on public lands." At the same time he forwarded to the Commissioner of the General Land Office a proposition of settlement for the timber cut by said company upon said lands, wherein said company offered to pay the sum of $180 in full for said trespass.

On December 31, 1888, the Commissioner of the General Land Office directed Special Agent Byrne to examine and ascertain whether or
17 not said railroad was being constructed as a common carrier or for personal and private gain.

On the 5th day of January, 1889, it filed with the register of the land office at Seattle its original and amended articles of incorporation under the laws of Washington Territory, the original bearing date March 20, 1883, and the amended on the 14th day of August, 1888. On the 28th day of January, 1889, the Commissioner of the General Land Office transmitted said articles of incorporation and proofs of the organization of the company to the Secretary of the Interior, with the recommendation that the same be filed; also a map showing the definite location of said company's road from a point in the SW. ¼ of the SW. ¼ of sec. 29, T. 23 N., R. 1 W., to a point in the NE. ¼ of the SE. ¼ of sec. 20, T. 24 N., R. 1 W., Seattle, Washington, a distance of about 13 miles, the approval of said map being recommended "subject to all existing possessory rights."

On the 29th day of January, 1889, said map of definite location was approved by Secretary Vilas.

On the 6th day of February, 1889 (pursuant to the direction of the Commissioner, December 31 aforesaid), Agent Byrne reported:

"That there is no doubt but what the road is being built for personal and private gain only, and will never be used as a common carrier for the benefit of the general public, because the character of the country through which it will pass and the small village which it will reach will not justify the maintenance or operation of any kind of a railroad."

With his report he inclosed the affidavits of John Lunk, Edwin C. Bemis, John McKenna, G. I. Yousted, Krist Thompson, Samuel Robertson, and C. A. Johnson.

On the 8th day of March, 1889, your office transmitted to the Department said report of Agent Byrne and the accompanying papers.

On the 29th day of March, 1889, the papers in the case were transmitted by this Department to the Attorney-General, and civil and criminal proceedings advised for the timber taken from the public lands by said company prior to its application for right of way privileges; an opinion was also requested as to whether the Department still retains jurisdiction for the purpose of making investigation as to the purpose and object of said incorporation, and of cancelling and revoking its order if it should appear that said approval was improperly granted. (See 8 L. D., 374.)

On the 4th of May, 1890, the opinion of the Hon. Attorney-General was received, in which he held that the Department of the Interior has jurisdiction to cancel its former approval of the maps of this route if it finds just cause therefor.

The question of jurisdiction having thus been disposed of by the Attorney-General, the matter was carefully considered by the Department, and on the 29th day of May, 1889, it was found from the evidence—

"That the approval of the articles of incorporation and maps of definite location of said company were obtained by false representations.

18 That said corporation is not such a duly organized and properly constituted railroad company as Congress contemplated or intended to provide the right of way for over the public lands, but that it is used exclusively for the private use and benefit of persons interested therein, and not for the use and benefit of the general public."

Thereupon you were directed to issue a rule and cause it to be served upon said company—

"Requiring it to show cause, within thirty days, why the approval of the articles of incorporation and maps of definite location, made by the Secretary of the Interior, January 29, 1889, should not be revoked and annulled."

Said rule was duly issued and served, and on behalf of said company Phillips, Zachry, and McKenney, as attorneys for it, filed an answer to the rule as follows:

"Now comes the Union River Logging R. R. Company, by its president, William Walker, and not acknowledging, but expressly denying, the jurisdiction of the Secretary of the Interior in the premises, makes answer as follows:

"1. The River Logging R. R. Co. was originally incorporated under the laws of Washington Territory on or about the 21st day of March, A.

D. 1883, by John McReavy, Edwin F. McReavy, and John Latham, for the purpose of building, equipping, running, maintaining, and operating a railroad for the transportation of saw logs, piles, and other timber, and to charge and receive compensation and tolls therefor. Said railroad being intended to run from a starting point at tide water in Lynch's Cove, at the head of Hood's Canal, in Mason County, in a northeasterly direction, a distance of ten miles, more or less, to a point at or near the northeast corner of township 24 north, range 1 west, Wil. Mer.

"2. That the said original incorporators constructed between four and one-half ($4\frac{1}{2}$) and five (5) miles of said road and equipped and operated the same for the purpose of transportating logs and timber as aforesaid.

"3. That on or about the day of , A. D. 188 , your orator and his associates, Cyrus Walker, D. B. Jackson, and Edwin G. Ames, purchased said road from its original incorporators and owners, paying therefor a large sum of money, aggregating many thousands of dollars.

"4. That said road was purchased for the purpose and with the intention of extending and improving the same, your orator and his associates being of the opinion that should said road be extended as hereinafter set forth so as to connect the tide waters of Hood's Canal with the tide waters of Dye's Islet, in Kitsap County, that an important and very desirable means of communication would be established, and a large section of country almost uninhabited but covered with a heavy growth of merchantable timber would thereby be opened up and rendered available for purposes of settlement and entry.

"5. That soon after purchasing said road and corporate franchise your orator undertook to devise ways and means for carrying into execution the desires and wishes of said purchasers, and on July 31st, 1888, at a special meeting of the board of trustees of the Union River Logging R. R. Co., it was decided by a unanimous vote to file supplemental articles of incoporation, under which said company would be authorized to extend its railroad and to do and perform the business of a common carrier thereon.

"6. That thereafter, to wit, on August 17, 1888, supplemental articles of incorporation were filed in accordance with the statute in such cases made and provided. Said articles authorized said company to construct and equip a railroad and telegraph line, from a convenient point at tide water in Lynch's Cove, at the head of Hood's Canal, running in a northeasterly direction to tide water in Dye's Islet, in Kitsap County; also to construct a branch from the main line at some convenient point running northerly to or near Seabeck on Hood's Canal; also to construct a branch from the main line by the most practicable route to tide water at or near Port Orchard; and also to construct such other branches as might be necessary or proper for the profitable management and extension of the business of said corporation.

19

"And said articles of incorporation further authorized said company to transport freight and passengers over said road and branches, and to receive tolls therefor, to borrow money to mortgage its railroads, branches, and rolling stock, to engage in several different kinds of business specifically mentioned, and generally to do and perform all the duties of a common carrier.

"7. That after the filing of said supplemental articles of incorporation and not before, said company, by its officers, believing themselves to be au-

thorized so to do by virtue of the act of March 3rd, 1875 (18 Stat., 482), and, acting in perfect good faith, commenced to extend the construction of its road, and in so doing cut away forty feet in width over a portion of section thirty-four (34) in township 24 N., R. 1. W., Wil. Mer., and graded the same.

"8. That thereafter, to wit, on January 5, 1889, duly certified copies of the company's articles of incorporation, together with a sworn map of a section of the road as definitely located, were filed in the local office, and after proper investigation and examination, the approval of William Vilas, the then Secretary of the Interior, was endorsed thereon.

"9. That the said company has ever since that time been engaged in extending its main line and building its various branches. That over the completed portions of its roads it has continuously operated trains, for the transportation of such freight as might be offered, and the carrying of such passengers as might present themselves.

"That said road being built through a timber district, the vast bulk of its business has been the transportation of saw logs, piles, and timber, although other classes of freight and many passengers have been transported.

"10. Your orator denies that said railroad is run in the interest of any man, association of men, or company to the exclusion of the public at large, but alleges and stands ready to prove that said railroad company since the 17th day of August, A. D. 1888, when it was chartered as a common carrier, has stood ready to transport any and all freight such as is usually offered for transportation, and has transported all such that was offered without regard to who was the owner thereof, and has carried all passengers who applied for transportation, refusing none.

"11. That as your orator and his associates conceived would be the case, with the increasing tide of immigration, many settlers have been induced to follow and locate along the line of the proposed road; lumbering operations on a more or less extensive scale have been put into execution, the surrounding country is rapidly being opened up, and the success of the proposed line of railroad as an important and necessary means of transportation through the country in which it is located is assured.

"12. Your orator denies that any false or fraudulent statement of any sort of kind were made for the purpose of procuring the approval of the company's articles of incorporations and right of way map.

"The application for such approval was made in strict compliance with the requirements of the statute and the departmental regulations issued in accordance therewith.

"No fraud of any sort or kind was sought or intended to be perpetrated either upon the law or upon the Department, but each and every statement contained in the application for approval and the accompanying papers was true in intent and fact.

"In support whereof, further affidavits are filed herewith.

"Wherefore your orator prays that the said Union River Logging Railroad Company may be dismissed hence without day.

"And your orator will ever pray, etc.

"WILLIAM WALKER,
"*Pres. U. R. L. R. R. Co.*,

"By PHILLIPS, ZACHRY & MCKENNEY,
"*His attorneys.*"

20 "DISTRICT OF COLUMBIA,

"*Washington City, ss:*

"F. D. MCKENNEY, being first duly sworn, deposes and says, that he is a member of the firm of Phillips, Zachry and McKenney, attorneys at law; that he has read over the foregoing answer and knows the contents thereof; that the statements therein contained are true to the best of his knowledge, information, and belief.

"F. D. MCKENNEY.

"Subscribed and sworn to before me this 31st day of July, 1890.

"MARTIN S. DECKER,

"*Notary Public.*"

The affidavits referred to in the answer of the company number fourteen in all, seven of them were made by persons living along the line of said railroad, and aside from the names, ages, length and place of residence of the several affiants, contain the same facts. One of them is all that is necessary to refer to as a sample:

"Stephen Willett, being first duly sworn, on oath deposes and says, that he is of the age of 42 years, and is, and for 3½ years last past has been, living in section 31, T. 23 north of range 1 W., and within one hundred yards of the Union River Logging Railroad Company; that during all of said time he has been accustomed, whenever occasion offered, or whenever he has desired so to do, to ship supplies, and such other freight as he desired, over the line of said road; that while it is true that the Union River Logging Railroad Company is chiefly engaged in the transportation of logs, piles, and such other timber, this affiant has had transported over said road all of the freight of various kinds, and said company has never refused to receive and transport freight for him; and this affiant fully believes that said company carries such other freight of any kind as is offered to it for transportation; that the principal and, up to the present, almost the only business along the line of said railroad has been the business of logging, but that the business adjacent to said road is now more rapidly settling up, and said road is now, and will continue to be, a most important factor in developing the section of country through which it runs."

In addition to the foregoing Raymond Cormier testifies that in the years 1887, 1888, and 1889, he was operating a logging camp and carrying on a logging business along the line of said railroad; that during said time said railroad company carried for him logs and timber; also transported freight for him. The affidavit of William Walker, the president of said road, shows that about the year 1886 he and his associates purchased the stock of said railroad; that it was then determined to extend said railroad from the waters of Hood's Canal to some point or points on Dyer's Inlet and to carry on with the said railroad the business of a common carrier for hire; that in July, 1888, it was decided to file supplemental articles of incorporation of said railroad so as to make it a common carrier.

"That thereafter said logging road was extended, and preparations have been made to further extend the same to the waters of Dyer's Inlet, in Kitsap County, and by a westerly branch to some point at or near Seabeck, on Hood's Canal. And that the owners of said road intend to so extend said road and to use the same as a common carrier for hire, and to transport over said road all business offered therefor."

That ever since the adoption of said supplemental articles of incorporation, said road has carried such freight, other than the logging
21 business, as has been offered to it and carried such passengers as desired to travel over its line. And continues:

"That said road runs through a country almost entirely uninhabited, and but just now filling up with settlers, and that the only business offered for said road of any consequence has been the logging business, in the transportation of which said road has been chiefly employed; that said road at no time since the filing of said supplemental articles has refused to transport freight and passengers offered for transportation, but has always been ready and willing so to do. That the settlers along the line of said road have and do use said road for the purpose of shipping small quantities of freight over the same and for transportation of themselves. Upon the completion of said road to Dyer's Inlet or to Seabeck, the present rate at which the surrounding country is being settled up said road will, in a few years, be an important means of transportation between the points above named. And this affiant further says that no fraud or misrepresentation of any kind has ever been made to the Department of the Interior in order to secure the approval of its map of definite location, and that all the statements contained in said application are, to the best of this affiant's belief, true."

The affidavit of E. G. Ames, dated July 9, 1890, shows that he was then vice-president of said railroad, and that for three years prior to April 29, 1890, he was the secretary of said road; and as to the facts corroborates the affidavit of Walker. On the 23rd day of September, 1890, said Ames made another affidavit in which he swears that the Union River Logging and Railroad Company, is, in all respects, a separate and distinct corporation from the Puget Mill Company, with different officers, only connected with the Puget Mill Company when it transports for said Puget Mill Company logs and timber.

"That the books of said Union River Logging Railroad Company show that during the year 1888, the transportation of said company amounted to upwards of seven million feet of logs, spars, piles, and other timber, yielding a profit to said company on its transportation account of upwards of thirteen thousand dollars, and for the year 1889 the transportation of logs, spars, piles, and other timber amounted to upwards of eight million feet, yielding a profit on the transportation account of said company of upwards of eight thousand dollars; that said timber was hauled principally for the Puget Sound Commercial Company and the Puget Mill Company, and that the hauling of said timber for said companies and other persons logging along the said road has been and is now the principal business of said company."

In a third affidavit made by said Ames, dated November 10, 1890, he states that the present owners of the Union River Logging and Railroad Company purchased it of McReavy and Latham, who had been conducting business with said road prior to 1885.

"That the said logging railroad was originally constructed and operated by said McReavy and Latham, and consisted only of a wooden railroad, the rails of which were made of square timbers of wood, and on which was operated a logging locomotive, known as the "Blackman" logging engine, which was an engine of a gauge of about eight feet, and designed solely

for hauling logs at a moderate rate of speed, and that the only other rolling stock which the said McReavy and Latham then had, consisted of one or two old style logging cars."

In the latter part of the year 1885, McReavy and Latham sold the stock of said company to the present owners.

"That soon after the purchase by the present owners of said road, new and supplemental articles of incorporation were filed, increasing
22 the powers of the company. In the following spring the new management of the road started in to rebuild it and put it in shape for carrying on the business contemplated in the articles of incorporation. . . . It was decided to relocate a right of way for almost the entire length of the line, which was then about four miles long. A new line was located, the old track torn up, a new roadbed made, and steel rails were used in building a standard-gauge railroad, and the road was properly ballasted and put in first-class condition for the purpose for which it was built. The new management then purchased an "H. K. Porter" seven een-ton locomotive and ten cars, which were used in operating the road, and later additional rolling stock was added to meet the requirements of the business along said road. Since the purchase of the road from McReavy and Latham the road has been extended about three miles, and further extensions are contemplated by the company."

The articles of incorporation of the Union River Logging Railroad Company were acknowledged on the 20th day of March, 1883, and recorded with the secretary of the Territory May 7, 1883. The supplemental articles were acknowledged August 14, 1888, and recorded with the secretary of the Territory September 8, 1888. It appears from the affidavit of W. H. Newel, the bookkeeper of the Puget Mill Company, that during the year 1888 said mill company paid to the Union River Railroad Company the sum of $16,344.24 for hauling logs over the line of said railroad company, and that for the year 1889 for like services paid to said railroad company $10,370.93.

It appears from an affidavit of C. R. Cronmer, the bookkeeper of the Union River Logging Railroad Company, that during the years 1887, 1888, and 1889 "it was a common thing for people living along the line of said road to have their freight sent over said road on the trains of the said Union River Logging Railroad Company."

In support of its answer the company filed a second affidavit of Edwin C. Bemis in which he reiterates the statements contained in his first one as to the object of the original incorporators, and adds:

"But I desire now to state that said railroad has been bought by other parties, and is being operated by other parties than the original incorporators, and since the last-named parties have controlled said road, I have never known them to refuse to carry freight or passengers, and that they do carry passengers and traffic that is offered to them as common carriers, and with the development of the country in that locality and the increased demand for railroad facilities, I have no doubt but that they will continue to use said railroad as a general common carrier and traffic road, and will, if so used, be of great advantage and general utility to that section of country, and in connection with other lines of transportation established with other lines of transportation, established and proposed, both by water and land, will, I have no doubt, be of great benefit not only to the owners but also to the people and country affected thereby."

The matter, upon the part of the respondent company, has been elaborately argued both orally and in print. A long array of authorities has been cited by counsel in support of their views, all of which have received careful and patient examination. The first question presented, and the one most strenuously urged, is whether the Department has jurisdiction in the premises. In the incipient stages of this proceeding this
23 question suggested itself, and in view of its importance it was submitted to the Attorney-General for his opinion, which he rendered under date of May 4, 1890.

In his opinion he says:

"There is no room to doubt, I think, that the privileges granted by the act of March 3, 1875, to any railroad company duly organized under State, Territorial, or Federal authority, of a right of way two hundred feet in width, through the public lands with the necessary lands for stations, shops, etc., together with the right to take earth, stone, timber, and other material from the public lands adjacent to the line of the road of such company, were meant to be extended by Congress to railroad companies intending to operate roads for the benefit and convenience of the public as common carriers, and not for their own benefit, except in so far as that benefit represented a return for their public services. This view is placed beyond doubt by the 3rd section of the act of 1875, which gives the Territorial legislatures power to provide for the condemnation of "private lands and possessory claims on the public lands of the United States" for the benefit of the railroad companies entitled to claim the privileges of the act, and it is almost needless to add that Congress can not be presumed to have had it in contemplation in this statute to authorize the right of eminent domain to be used for the benefit of a merely trading corporation. . . There can be no doubt that, for the benefit of settlers as well as its own, the Government has the right to have an authoritative declaration made that the public lands through which the line of the railroad in question runs are not subject to the burdens imposed by the act of 1875. . . . . It follows then, that the application to the Department was for a purpose not authorized by law, and that the action taken in granting the application was void, it being perfectly clear that no disposition can be made of any part of the public domain without the authority of Congress. . . . . To hold that the Department can not in this case cancel its approval and erase the line of the railroad from the public plats, but that the United States must go into a court of equity for that purpose, would seem to urge the conclusiveness of executive action to an unreasonable extent. The principle of *res judicata* while, to some extent applicable to the action of executive officers, has never been held to prevent an officer from reopening a matter in which he acted on a mistake of fact, or where new and additional evidence, which would justify a new trial or a rehearing, has been adduced. . . . . In the case before me it is entirely practicable for the Department to remove the line of railroad from the public plats, both here and in the local land office, and thus, effectually, cancel the approval improvidently given. It is not necessary, in order to undo what has been done, to compel the company to surrender any paper for cancellation, because it is the public plats alone that need to be changed, and these are under the entire control of the Department of the Interior. . . . It would seem to be a useless

circuity to have recourse to judicial proceedings to correct executive action in a case like the one in hand where there is a concurrence of mistake of fact and want of power in the Department, and when the void proceeding is an obstacle in the way of the Land Office."

He supports his opinion by reference to, and quotations from Attorney-General Wirt (2 Opinions, 41); Attorney-General Cushing (7 Opinions, 701); the case of the United States v. Bank of Metropolis (15 Pet., 377, 401), and concludes:

"That the company is not entitled to enjoy the benefits of the act of March 3, 1875, and that it is within the competency of the Department of the Interior to recall and annul its action approving the line of definite location of the railroad company and entering the same on the public plats."

I do not think this company is of the character contemplated by the act of March 3, 1875 (18 Stats., 482), granting to railroads the
24 right of way through the public lands, section 1 of which reads as follows:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

While the act does not specifically define the character of the railroads which shall be entitled to the benefits of its provisions, yet it seems clear that Congress only meant to extend the benefits of the act to such railroads as are quasi public corporations and are common carriers of passengers and freight, having time cards, passenger and freight tariffs, station buildings, depots, machine shops, side tracks, turn-outs, and water stations, for their use and operation; and for the use of the public, and such cars as are necessary for the safe and proper transportation of freight of different kinds, and the carrying of passengers over the line of such railroad. It is a railway which is of some benefit to the public that Congress desired to favor.

This company is not equipped with the instrumentalities evidencing such a corporation. It is purely a private enterprise, constructed solely for the transportation of supplies necessary to feed these mills, and make them and the traffic in logs and lumber a profitable venture.

In this proceeding the respondent company was called upon to show cause why the approval of its map of definite location should not be annulled. Under said rule, it was bound to show that it was in fact such a railroad as the act of Congress extends the right of way over the public lands to, and that it was rightfully entitled to the benefits conferred by said act. It was not called on to show simply that it was organized as a railroad on paper, but a railroad in fact. Its answer is indefinite and uncertain in its statements of fact; the evidence in support of its answer fails to

show that said company has any depot or freight houses or has cars suitable for carrying general freight or passengers; fails to show that said road has any schedule of rates for carrying passengers or freight; fails to show that it runs its trains upon regular trips or at stated times for the accommodation of the general public; fails to show that it starts from or terminates at any town or city. On the contrary, it appears that said road has been in operation for several years through a scope of country heavily timbered and sparsely settled; that its business has been and consists almost altogether in transporting logs and lumber to tide water on Hood's Canal.

That it has been operated not as a public railroad, but a private
25 concern; not in the interest of the public as a common carrier, but in the private interest of its owners and promoters.

From a careful examination of the whole record I find:

First. That at the time the respondent company filed its articles of incorporation with the register of the local land office, and at the time its map of definite location, or profile, was approved by the Secretary of the Interior, said company was not in fact such a railroad company as would be entitled to the benefits of the act of March 3, 1875. (18 Stats., 482.)

Second. That the approval of the map of definite location, or profile, of the respondent company's line of road, made by the Secretary of the Interior on January 29, 1889, was procured by fraud and false representations.

From the examination given the authorities, as well as upon principles of a sound public policy, and a just and proper administration of the public land laws, I reach the conclusion that in a case like the one at bar the Secretary of the Interior has the power and authority to recall, annul, and set aside the action of his predecessor in office in approving the map of definite location, or profile, of a railroad company, filed under the 4th section of the act of March 3, 1875. Having the power, the case at bar calls for its exercise as a bounden duty.

It is accordingly ordered that the approval of the Secretary of the Interior, dated on the 29th day of January, 1889, of the map of definite location, or profile, of the Union River Logging Railroad Company be, and the same is hereby, annulled, canceled, set aside, and held for naught, and you are directed to carry out this order by causing it to be entered upon the appropriate plats and records of your office and the proper local land office.

(Endorsed:) Sup. Ct. Dist. of Columbia. The Union River Logging R. R. Company *vs.* John W. Noble, Secty. of the Interior, and Thomas H. Carter, Comm'r of Gen'l Land Office. In Equity. No. 13503. Respondent's Exhibit A. Filed Mar. 19, 1892. J. R. Young, clerk.

26 *Respondent's Exhibit B, filed March* 19, 1892.

UNITED STATES OF AMERICA.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Mch. 17, 1892.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed paper is a true copy of the original on file in this Department.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

JOHN W. NOBLE,
Secretary of the Interio .

[Seal Department of the Interior.]

27 In the Department of the Interior, before the Secretary.

In the matter of the Union River Logging Railway Company, respondent. Rule to show cause, &c.

Motion for review.

Now comes the above-named respondent, by its attorneys, and moves the Secretary of the Interior to review and reverse his decision rendered on the second day of June, 1891, for the following errors appearing therein, viz:

1. Error in assuming jurisdiction in the premises.

2. Error in holding that the approval of the Secretary of the Interior, dated January 29, 1889, was not conclusive as to the jurisdiction of the Department in the premises.

3. Error in holding that a succeeding Secretary of the Interior could lawfully annul the action of his predecessor theretofore taken in matters by law intrusted to his judgment.

4. Error in holding that the failure to perform conditions subsequent, even if such failure existed, could operate to render void a grant already vested.

5. Error in holding that the Union River Logging Railway Company is not a railway company within the contemplation of the act of March 3, 1875. (18 Stats., 482.)

6. Error in holding that under all the circumstances of the case no right of property vested by virtue of the approval of the company's articles of incorporation and right-of-way maps.

7. The requirements of the statute, as appearing from the language thereof, having been fully complied with, and the then practice of the Department in regard to applications for right of way thereunder having been fully satisfied, it was error to apply a subsequent con-
28 struction of the statute to adjudicated cases, thereby casting a cloud upon property rights already vested, and by giving a retrospective effect to such construction to destroy contract rights theretofore acquired.

8. Error in not giving due effect to the action of Secretary Vilas in approving the company's articles of incorporation and profile of its road.

9. Error in holding that the action of Secretary Vilas could be annulled and the contract rights prima facie resulting therefrom could be cancelled save by "due process of law."

10. Error in not giving due effect to the plain provisions of Article V of the amendments to the Constitution of the United States.

11. Error in annulling, cancelling and setting aside the approval of January 29, 1889.

(Signed) PHILLIPS & MCKENNEY,
Attorneys for the Union River Logging Railway Company.

DISTRICT OF COLUMBIA, *ss:*

F. D. McKenney, being first duly sworn, deposes and says that he is a member of the firm of Phillips & McKenney, whose firm name is subscribed to the foregoing motion for review, that he is well acquainted with the contents of said motion and that the same is made in good faith and not for purposes of delay.

(Signed) F. D. MCKENNEY.

Subscribed and sworn to before me this 1st day of July, A. D. 1891.

(Signed) MARTIN S. DECKER,
Notary Public, D. C.

(L. S.]

29 (Endorsed :) About July 3, 1891. 81651. In the matter of the Union River Logging Railway Company, respondent. Rule to show cause. Motion for review and reversal of decision of June 2, 1891. Phillips & McKenney. Sup. Ct. Dist. of Col. The Union River Logging R. R. Company vs. John W. Noble, Secretary of the Interior, and Thomas H. Carter, Comm'r of Gen'l Land Office. In equity No. 13503. Respondent's Exhibit B. Filed Mar. 19, 1892. J. R. Young, clerk.

30 In the Supreme Court of the District of Columbia.

[Filed May 25, 1892.—J. R. Young, Clerk.]

THE UNION RIVER LOGGING RAILROAD COMPANY *vs.* JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and Thomas H. Carter, Commissioner of the General Land Office.	No. 13503 in equity.

Mr. Justice JAMES delivered the opinion of the court.

This is a bill to restrain the Secretary of the Interior and the Commissioner of the General Land Office from molesting the complainant's right of way through certain lands of the United States granted to it under the act of 3 March, 1875. 18 Stat. 482.

The first section of that act provides, "That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of the said road; also the right to take from the lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

31 The fourth section provides: "That any railroad company desiring to secure the benefits of this act shall, within twelve months

after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of such road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The bill states substantially the following case, as showing compliance with these requirements and the vesting in complainant of a right of way.

The code of the Territory of Washington, adopted in 1881, provided the manner in which companies for the purpose of building and running railroads should be incorporated and organized. In 1883 certain persons organized, in accordance with these provisions, a company called "The Union River Logging Railroad Company," whose business and objects as stated in the articles were to be "the building, running, &c., a railroad for the transportation of saw-logs, piles, and other timber and wood and lumber, and to charge and receive compensation and tolls therefor." The route of this road was from tide-water in Lynch's Cove, at the head of Hood's Canal, to a point at or near the northeast corner of township 24, north of range one east, of the Willamette meridian. The company proceeded to construct and equip a railroad extending some four miles from Lynch's Cove, and to transport over it saw logs and other timber.

On the 29th of December, 1885, certain other persons purchased
32 from its then stockholders the whole of the capital stock of the company, and took control of its franchises, property, and business. Afterwards, on the 17th of August, 1888, these new stockholders in pursuance of authority granted by the act of 1881, filed supplemental articles of incorporation, as follows:

"First. To construct and equip a railroad and telegraph line from a convenient point on tide water on Lynch's Cove, at the head of Hood's Canal, in Mason County, Washington Territory, and running thence in a general northeasterly direction, by the most practicable route, to a convenient point on tide water on Dye's Inlet, in the count' of Kitsap, in said Territory; and also a branch from said line, at some convenient point thereon between Lynch's Cove and Dye's Inlet, and running thence in a general northerly direction by the most practicable route to or near the town of Seabeck, on Hood's Canal, in said county of Kitsap; and also a branch from some convenient point on the line of said road between said Lynch's Cove and Dye's Inlet, and running in a general northeasterly direction, by the most practicable route, to tide water at or near Port Orchard, in said county of Kitsap; and also to construct and equip such other branches to said railroad and telegraph line as may be necessary for the proper and profitable management or extension of the business of said corporation.

"Second. To maintain and operate said railroad and branches and carry freight and passengers thereon and receive tolls therefor."

* * * * * * *

In the autumn of 1888, after the filing of these supplementary articles of incorporation, plaintiff's attention was called to the fact that the act of Congress above referred to required that any railroad company which should propose to avail itself of the right of way and other privileges granted by that act should previously file with the Secretary of the Interior a copy of its articles of incorporation, together with due proofs of its organization. Thereupon, on the 5th of January, 1889, it filed with the register of the land office at Seattle the following papers, duly
33 certified and sworn to, namely, a copy of its articles of incorporation, a copy of the Territorial law under which the company was organized, a certificate of the secretary of the Territory that the articles of incorporation has been so filed in his office with the date thereof, an official certificate by the secretary of the company of its organization and of the copy of the articles filed with the Secretary of the Interior, a true list of the names and designations of its officers at that date, and a map showing the termini of the road, its length, and its route over the public lands, according to the public surveys. This was done in accordance with the directions of a circular for that purpose issued by the Secretary of the Interior on the 7th of November, 1879. On the 10th of January, 1889, the register at Seattle transmitted these papers to the Commissioner of the General Land Office, and he in turn, on the 28th of the same month, transmitted them to the Secretary of the Interior, at the same time approving them and recommending that they be received and placed on file. On the 29th of the same month they were approved, in writing, by the Secretary of the Interior, at that time William F. Vilas, esq., and were ordered to be filed. They were accordingly so filed, and the plaintiff was notified thereof.

Afterwards, in the spring of the year 1889, the plaintiff constructed its line for three miles beyond the point to which it had previously extended, located at intervals a better line of road, made and ballasted a new road bed of standard guage, and substituted steel rails and another locomotive for the rails and equipments which had sufficed for the limited purposes specified in its original articles of incorporation.

On the 13th of June, 1890, a copy of an order by John W. Noble, esq., Secretary of the Interior, was served upon the plaintiff, directing it to show cause why the above "approval of its articles of incorporation and maps of definite location should not be revoked and annul'ed" Thereupon the plaintiff, protesting at the same time that such revocation and annulment was beyond the power of the Secretary, did show
34 cause as directed; but nevertheless, on the 2nd of June, 189 , George Chandler, esq., then the acting Secretary of the Interior, made the rule to show cause absolute, and ordered, "that the approval of the Secretary of the Interior, dated of the 29th of January, 1889, of the maps of definite location or profile of the Union River Logging Railroad Company, be, and the same is hereby annulled, cancelled, set aside, and held for naught," and directed the Commissioner of the General Land Office "to carry out this order by causing it to be entered upon the appropriate plats and records of his office and the proper local land office."

The bill avers that the defendants are about to carry out this order, and prays that it may itself be declared void, and that the defendants may be

enjoined not to molest the plaintiff's enjoyment of the right of way and of the privileges secured to it by the approval and order of 29th January, 1889.

The joint answer of the defendants admits the truth of the allegations above set forth in substance, and then proceeds as follows:

"As to the remaining paragraphs of the bill, these respondents say that it became known to them that the complainant company was not engaged in the business of a common carrier of passengers and freight at the time of its application for admission to the privileges of the act of Congress of March 5, 1875, chapter 152, but that it was engaged at the time in the transportation of logs for the private use and benefit of the several persons composing the said company; and thereupon your respondent, John W. Noble, Secretary of the Interior, being advised that a railroad company, carrying on merely a private business, was not such a railroad company as is contemplated by the said act of Congress, deemed it his duty to take proper steps to vacate and annul the action of the honorable William F. Vilas, Secretary of the Interior, of January 29, 1889, approving the application of the complainant company under the said act of Congress
35 and the maps of definite location accompanying the same; and to that end this respondent caused notice to be given to the complainant company to show cause why the said action of the Secretary of the Interior should not be vacated and annulled."

Secretary Noble states that he had approved the order of Acting Secretary Chandler annulling the action of Secretary Vilas, and had directed the Commissioner to carry into effect such annulling order. He further states that he was advised that he had the right to revoke the action of his predecessor as having been done improvidently and on false suggestions and without authority under the said statute.

It further appears by the answer that an application for a rehearing had been filed with and is now pending and undecided.

Some statements, or rather suggeesions, of facts were made at the argument to which we have not thought it proper to allude. As this case was submitted on the bill and answer and accompanying exhibits we know only what is there shown, and it is because the facts appear only in this way that we have stated the contents of the pleadings at such length. The question to be considered by us is whether the facts thus shown entitle the complainant to an injunction.

In the first place, the act of 3 March, 1875, in granting right of way through the public lands, used the word "railroads" in its ordinary sense. It was intended to apply only to roads which serve a public use; in other words, to common-carrier roads. Whenever an application for the necessary approval of its map of location is made by a company already carrying on business, the very first duty which the statute imposes on the Secretary of the Interior is that he shall ascertain whether the applicant is a railroad company within the meaning of the act; that is, whether its road is for public or only for private use. Indeed the respondent's own attitude is that such an inquiry is part of the Secretary's business. He himself is asserting that the Secretary of the Interior is competent to ascertain, and is charged to ascertain whether an applicant was, at the time of its application, in good faith a railroad within the meaning of
36 the statute. The very assertion of power relating to that matter which respondent now makes, is a contention that this is an in-

quiry which is the duty of the Secretary of the Interior to institute, and that it is a concession that Secretary Vilas had the same power and was charged with the same duty. It is not, however, to any argumentum ad hominem that we give weight. The statute plainly made it the duty of Secretary Vilas to ascertain the validity of complainant's pretensions, and whether it was competent to acquire rights under the statute.

What effect did the statute intend to give to this inquiry and ascertainment? Was it intended that there should be no time at which executive action should become conclusive? The applicant is invited and authorized by the statute to proceed at once with the construction of its road on obtaining approval of its location. When such steps are actually taken in consequence of such approval it would seem to be the intention of the legislature that, so far as executive inquiry is concerned, the Secretary's approval shall stand as a decision. It is not conceivable that the same law which authorizes a railroad company to build its road upon obtaining the Secretary's approval of its location, should contemplate further inquiry by him into its right to do so after it has built its road. We conceive, then, that the function of executive inquiry under this statute ceases when a railroad company has obtained approval of its location of route, and has, upon that authority, expended moneys in building its road. The executive determination of its status and qualification to be a grantee of right of way stands, then, as an authorized executive decision, a decision which is conclusive against executive interference.

Next, what is the nature of the right acquired by a railroad company? We observed at the argument that counsel for the respondent characterized it as "a privilege," as if it were some kind of sufferance or revokable gratuity, and thus differed essentially from a property right. It is
37 enough, perhaps, that the statute calls it "a right of way." In the absence of any indication of a different meaning we perceive no reason to suppose that these words have less than their usual force. A right of way means a property right, and there is not only no reason to suppose that it means less in this statute, but there is reason for a contrary acceptation. These concessions have in view the earlier settlement of the public lands. They are made for the public welfare, and anything less than a complete and permanent grant of a property right would be inconsistent with the objects, as well as with the words of the statute. Still more would any uncertain "privilege" or sufferance be inconsistent with an invitation to expend moneys in constructing railroads. We conceive that it is plain, then, that the right of way conceded under this statute is a right in the most absolute sense; a property right as perfect as that which is acquired by purchase of the soil under the public land laws.

The same principles apply, then, in this case which have been applied by the Supreme Court to patents conveying public lands. They apply, in the first place, in ascertaining the nature and scope of the Secretary's action in approving a map of location, and, in the second, in determining whether there is any executive power to interfere after title has vested in the railroad.

In Steel vs. Smelting Company, 106th U. S. 447 [451], the Supreme Court held that the officers of the Land Department acted as a special tribunal for the decision of all matters which must be decided before issuing a land patent, and that such decisions were, for executive purposes, con-

clusive. In that case the ground taken was, that a patent was void because it had been obtained by "fraud, bribery, perjury, and subornation of perjury." The court, speaking of the Land Department, said that "necessarily it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by
38 direct proceedings for its annulment or limitation." It is especially pertinent to the present inquiry that the court held that executive power could not annul action which had caused title to pass on the ground that it had been obtained by fraud.

In Johnson vs. Towsley, 13 Wall., 73 [83], Mr. Justice Miller, speaking for the court, declared it to be "the general doctrine that when the law confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others. That the action of the Land Office in issuing a patent for any of the public lands subject to sale, by preemption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or of the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained."

According to these decisions the Secretary of the Interior acts as a special tribunal to determine all the facts which must be considered before he approves a map of location; and in all cases the "qualifications of the applicant" to acquire a right of way—in other words, the fact that it is a railroad within the meaning of the statute—is one of these facts. And according to these same decisions when an affirmative decision is made and the map of location is approved, the legal title to a right of way vests at once by operation of the statute. We can perceive no difference in this respect between the action of the Land Department in executing a patent whereby it directly conveys the title and the action of the Secretary whereby the statute is caused to vest title. In both cases title is passed by means of executive determination and action. And it vests, as the Supreme Court has held in the cases referred to, even if executive action be obtained by fraudulent misrepresentation. From that time it must be treated as a legal title. "In all courts and in all forms of judicial proceedings
39 where this title must control, either by reason of the limited powers of the court or of the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained." A nulto portiori must it be conclusive against all subsequent executive inquiry.

If in fact an approval of location is obtained by an applicant not qualfied according to the statute to have a right of way, its legal title is undoubtedly liable to annulments; but until annulled it must be regarded as property, and the holder can be deprived of it only by due process of law. It is hardly necessary to demonstrate that, in such matters as this, due process is by judicial proceedings instituted in a court of competent jurisdiction for the purpose of a direct annulment of title.

It can hardly be maintained that executive power is larger in this case than in the case of a patent, on the ground that an entry of approval of location is merely an office record. It may be an office record of which only the Land Department shall have custody, but it is not merely that. The statute makes that record an element of the title; it is thereby one of the muniments of title, and the owner of the right of way has an interest in its existence and preservation. In so far as it is a muniment of title it is subject to no larger executive control or disposal than a patent conveying lands would be.

The question of relief remains to be considered. When a public officer assumes powers over property which do not belong to him, and infringes upon or violates the rights of a citizen under pretense of such assumed authority, equity has jurisdiction to interfere by injunction. Kerr on Injunc. see 1309. The annulment of the former approval of complainant's location must have the effect to impair its peaceful enjoyment of its right of way, and to expose it to trespasses and interruptions. We conceive that it is not necessary that these interruptions should proceed immediately from the respondent. Apart from such trespasses, the impairment of the complainant's muniment of title is itself an injury which is a
40 proper subject of restraint.

We observe that the answer of Secretary Noble states that complainant's motion for a rehearing is still pending and undecided. This may be a suggestion that respondent can not now be supposed to threaten to carry out the order complained of, but on the other hand the answer admits the allegations contained in the first seventeen paragraphs of the bill, and one of these is an averment that the respondents are about to carry out that order. Besides, we find the respondent insisting upon his right and duty to do so, and must therefore understand that he will do so unless restrained.

An order of injunction may be prepared according to this opinion.

JAMES, *Justice.*

41 In the supreme court of the District of Columbia, in general term.

[Filed Jul. 11, 1892. J. R. Young, clerk.]

THE UNION RIVER LOGGING RAILROAD COMPANY, compl.,
vs.
JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and Thomas H. Carter, Commissioner of the General Land Office, defts.
} In equity. No. 13503.

Decree.

This cause coming on to be heard upon the bill, answer, and accompanying exhibits, and having been argued by counsel and duly considered by the court—

It is now, this 11th day of July, 1892, adjudged, ordered, and decreed that the said John W. Noble and the said Thomas H. Carter be, and they are hereby, perpetually enjoined and restrained from executing the order

of June 2nd, 1891, purporting to annul, set aside, and hold for naught the approval of the Secretary of the Interior dated on the 29th day of January, 1889, of the maps of definite location or profile of the Union River Logging Railroad Company, and that they be perpetually enjoined and restrained from entering or causing to be entered the said order of June 2nd, 1891, upon the plats and records of the General Land Office of the United States, or of any local land office, and that the complainant do have and recover of and from the defendants, John W. Noble and Thomas H. Carter, its costs in this behalf expended, for which let execution issue. An appeal was prayed in open court and is allowed to the Supreme Court of the United States.

E. E. BINGHAM, *C. J.*

42 UNITED STATES OF AMERICA,
District of Columbia, ss.:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify that the foregoing is a full and true copy of the record and of all proceedings therein in the case in equity entitled the Union River Logging Company vs. John W. Noble, Secretary of the Interior, and Thomas H. Carter, Commissioner of the General Land Office, as the same remains upon the files and records of said court.

In testimony whereof I hereunto sub-cribe my name and affix the seal of said supreme court of the District of Columbia this 11th day of August, A. D. 1892.

[SEAL.] J. R. YOUNG,
Clerk.

[Indorsed:] Case No. 15127. Term No. 1157. John W. Noble, Secretary of the Interior, and Thomas H. Carter, Commissioner of the General Land Office, appellants, vs. The Union River Logging Railroad Company. Filed September 7th, 1892. Supreme Court U. S., clerk's office. Received Aug. 27, 1892.

Office Supreme Court U. S.
FILED.
DEC 9 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and Thomas H. Carter, Commissioner of the General Land Office, appellants,
vs.
THE UNION RIVER LOGGING RAILROAD COMPANY.

No. 1157

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN W. NOBLE, SECRETARY OF THE INTERIOR, and Thomas H. Carter, Commissioner of the General Land Office, appellants,
vs.
THE UNION RIVER LOGGING RAILROAD COMPANY.

No. 1157.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

This is an injunction bill filed by the Union River Logging Railroad Company, against the Secretary of the Interior, and the Commissioner of the General Land Office.

THE BILL.

The complainant, as averred in the bill, is a corporation created under the general laws of the Territory of Washington on March 20, 1883, when its articles of incorporation were filed, making it a corporation for fifty years, with a capital stock of $50,000 in shares of $100 each, for the purpose of "*the building, equipping, running, main-*

taining, and operating of a railroad for the transportation of saw logs, piles, and other timber, and wood and lumber, and to charge and receive compensation and tolls therefor;" and which was "*to run from tide water in Lynch's Cove, at the head of Hood's Canal, in said Mason County, and running thence in a general northeasterly direction, by the most practical route,* A DISTANCE OF ABOUT TEN MILES, *more or less, * * * and generally to do all things necessary or convenient for the accomplishment of the objects above specified.*"

Under these articles of incorporation the complainant "proceeded *by degrees* to construct and equip a railroad, extending from tide water in Lynch Cove, *in all some 4 miles*, along the line above mentioned and over the same to transport saw logs and other lumber and timber, as authorized "and required by law." (Bill, par. 6, p 2.)

In August, 1888, the complainant, intending "to enlarge the scope of its business and duties to the public," filed supplemental articles of incorporation, which provide for a line of railroad from Lynch Cove to Dye Inlet, "by the most practicable route," and a branch line from said road to the town of Seabeck "by the most practicable route," and another branch line to tide water, at or near Port Orchard, "by the most practicable route;" and also the construction and equipment of "such other branches to said railroad and telegraph line AS MAY BE NECESSARY FOR THE PROPER AND PROFITABLE MANAGEMENT OR EXTENSION OF THE BUSINESS OF SAID CORPORATION." (Bill, par. 10, p. 3.)

Under the supplemental articles it is recited to be among the complainant's purposes "to maintain and operate said

railroad and branches and carry freight and passengers thereon and receive tolls therefor:" and also "*to engage and carry on a general logging business and provide for the cutting, hauling, transportation, buying, owning, acquiring, and selling of all kinds of logs, spars, piles, poles, lumber, and timber*," and *to carry on any business, trade, manufactories, and mercantile pursuits for which a private corporation may be formed under the laws of Washington Territory*." (P. 3.)

Under the supplemental articles complainant has added *3 miles* to the 4 miles of railroad already built, and has "located at intervals a better line of road, made and ballasted a new roadbed of standard gauge, and substituted steel rails AND ANOTHER LOCOMOTIVE in place of those rails and equipments which had been sufficient for its limited purposes, as specified in the original articles." (Bill, par. 11, p. 3.)

In January, 1889, the complainant company took steps to avail itself of the privileges extended by the act of Congress of March 3, 1875 (18 Stat. 482), granting "a right of way through the public lands" to "any" railroad company duly organized under the laws of any State or Territory, or of Congress, "which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of 100 feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations," etc.

Section 4 provides as follows:

> That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of ANY SECTION OF TWENTY MILES OF ITS ROAD, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The bill then avers that complainant, on January 5, 1889, filed in the office of the register of the land office at Seattle a copy of its articles of incorporation and other documents, as required by the regulations of the Secretary of the Interior to govern applications under the said act (p. 4).

The bill further avers that the papers and documents thus filed were transmitted by the Register to the Commissioner of the General Land Office on January 10, 1889, and that on the 28th of the same month they were sent by the Commissioner to the Secretary of the Interior with his approval and his recommendation that they be received and filed, and that this was done, accordingly, on the next day, and the complainant notified thereof (p. 4).

The bill then states that on June 13, 1890, complainant was served with notice to show cause why "the approval of its articles of incorporation and maps of definite location should not be revoked and annulled," and that afterwards, on June 2, 1891, the Acting Secretary of the Interior ordered "*that the approval of the Secretary of the Interior, dated on the 29th day of January*, 1889, *of the*

maps of definite location or profile of the Union River Logging Railroad Company, be, and the same is hereby, annulled, canceled, set aside, and held for naught," and directed the Commissioner of the General Land Office "*to carry out this order by causing it to be entered upon the appropriate plats and records of his office and the proper land office,*" and that the defendants are about to put this order into execution. (P. 4).

The bill claims that the effect of the said order of January 29, 1889, was to vest in him a right under the said act of March 3, 1875, which could not be divested by the said order of June 2, 1891, and that the effect of putting this order in operation will be to raise a cloud upon and otherwise embarrass complainant's right. And the prayer of the bill is that the order of June 2, 1891, may be annulled, in so far as it purports to interfere with complainant's right, and that the defendants may be enjoined from executing said order or in any way molesting complainant in the premises, and for general relief (p. 5).

THE ANSWER.

The answer of the Secretary of the Interior and the Commissioner of the General Land Office (pp. 7, 8) states that at the time complainant applied for admission to the privileges of the act of March 3, 1875, it was "*not engaged in the business of a common carrier of passengers and freight,*" but that "*it was engaged at that time in the transportation of logs for the private use and benefit of the several persons composing the said company;*" and that when this became known to them, the respondent

Noble, "*being advised that a railroad company carrying on a merely private business was not such a railroad company as is contemplated by the said act of Congress, deemed it his duty to take proper steps to vacate and annul*" the order of January 29, 1889, made by his immediate predecessor, and admits that proceedings to that end were had, as stated in the bill, and avers that the said order of January 29, 1889, was made improvidently and on false suggestions and without authority under the said statute, and that therefore no case is presented for the interference of a court of equity. The answer also states that a motion by complainant is pending in the Interior Department for the review and reversal by the Secretary of the order of June 2, 1891, which is pending and undecided.

Accompanying the answer is a copy of the communication from Acting Secretary Chandler to the Commissioner of the General Land Office (marked Respondents' Exhibit A), containing the order of June 2, 1891, together with a careful and elaborate statement of the grounds in law and fact on which the said order is based (pp. 9–18).

This communication is a part of the answer, being therein referred to for a more particular statement of the action taken by the Acting Secretary.

It shows that this Union River Logging Railroad Company was first known to the Land Department in August, 1886, as a *trespasser and depredator* on public and private timber lands, and as seeking to avoid the penalty of the law by offering to pay a sum in full for its trespasses.

Finding it dangerous to defy the law, now that the eyes of the agents of the Government were on them, this

company sought to continue its depredations under cover of a simulated compliance with the said act of March 3, 1875. It is an *interesting coincidence* that it should have *first heard* of that statute at that juncture, as the bill avers.

It further appears that *in about a week after the Secretary's approval of the complainant's map of definite location*, Agent Byrne reported: "*That there is no doubt but what the road is being built for personal and private gain only, and will never be used as a common carrier for the benefit of the general public, because the character of the country through which it will pass, and the small village which it will reach, will not justify the maintenance or operation of any kind of a railroad*" (p. 10). This report was supported by seven affidavits.

On March 29, 1889, just two months after the acceptance and approval of complainant's map, the Department of the Interior requested the Attorney-General to prosecute the complainant, civilly and criminally, for timber taken, and also requested that officer's opinion as to whether the Department still retained jurisdiction for the purpose of investigating the true character of the business of complainant and of revoking the said order of January 29, 1889, if occasion should require it. (P. 10.)

The Attorney-General having answered in the affirmative, it turned out on investigation, as the result of the evidence, the Acting Secretary informs us, "That the approval of the articles of incorporation and maps of definite location of said company *were obtained by false representations*. That said corporation is not such a duly organized and properly constituted railroad company as

Congress contemplated or intended to provide the right of way for over the public lands, *but that it is used exclusively for the private use and benefit of persons interested therein, and not for the use and benefit of the general public*" (p. 10).

Then and thereupon the rule was served on complainant, requiring it to show cause why the said order of January 29, 1889, should not be revoked and annulled.

The Acting Secretary concludes his elaborate consideration of the question before him as follows:

> This company is not equipped with the instrumentalities evidencing such a corporation. *It is purely a private enterprise, constructed solely for the transportation of supplies necessary to feed these mills, and make them and the traffic in logs and lumber a profitable venture.*
>
> In this proceeding the respondent company was called upon to show cause why the approval of its map of definite location should not be annulled. Under said rule, it was bound to show that it was in fact such a railroad as the act of Congress extends the right of way over the public lands to, and that it was rightfully entitled to the benefits conferred by said act. *It was not called on to show simply that it was organized as a railroad on paper, but a railroad in fact. Its answer is indefinite and uncertain in its statements of fact; the evidence in support of its answer fails to show that said company has any depot or freight houses or has cars suitable for carrying general freight or passengers; fails to show that said road has any schedule of rates for carrying passengers or freight; fails to show that it runs its trains upon regular trips or at stated times for the accommodation of the general public; fails to show that it starts from or terminates at any town or city.* On the contrary, it appears that said road has been in operation for several years through a scope of country heavily timbered and sparsely settled; that its business has been and consists almost altogether in transporting logs and lumber to tide water on Hood's Canal. That it has been operated not as a public railroad, but a private concern; *not in the interest of the public as a common carrier, but in the private interest of its owners and promoters.*
>
> From a careful examination of the whole record I find:
>
> First. That at the time the respondent company filed its articles of incorporation with the register of the local land office, and at the time its map of definite location, or profile, was approved by the Secretary of the Interior, said company was not in fact such a railroad company as would be entitled to the benefits of the act of March 3, 1875. (18 Stats., 482.)
>
> Second. That the approval of the map of definite location, or profile, of the respondent company's line of road, made by the Secretary of the Interior on January 29, 1889, *was procured by fraud and false representations.*

From the examination given the authorities, as well as upon principles of a sound public policy, and a just and proper administration of the public land laws, I reach the conclusion that in a case like the one at bar the Secretary of the Interior has the power and authority to recall, annul, and set aside the action of his predecessor in office in approving the map of definite location, or profile, of a railroad company, filed under the 4th section of the act of March 3, 1875. Having the power, the case at bar calls for its exercise as a bounden duty.

It is accordingly ordered that the approval of the Secretary of the Interior, dated on the 29th day of January, 1889, of the map of definite location, or profile, of the Union River Logging Railroad Company be, and the same is hereby, annulled, canceled, set aside, and held for naught, and you are directed to carry out this order by causing it to be entered upon the appropriate plats and records of your office and the proper local land office. (Pp. 17, 18.)

HEARING.

The complainant filed no replication, and the cause was heard on the bill, answer, and exhibits in general term, having been certified thereto to be heard in the first instance. (P. 6.)

DECREE.

On July 11, 1892, the court entered a decree perpetually enjoining the respondents from executing the said order of June 2, 1891, and thereupon an appeal was prayed in open court. (Pp. 26, 27.)

ASSIGNMENT OF ERROR.

The decree is believed to be erroneous in this, that the learned court below did not dismiss the bill, as not presenting a case calling for the interference of a court of equity.

ARGUMENT.

The complainant having brought the cause on for hearing on "the bill, answer, and accompanying exhibits," has necessarily admitted as true every matter contained

in the answer, whether responsive, or of pure avoidance, or merely stated on respondents' belief and the hope to be able to prove it, since the complainant, by not replying, has excluded the defendants from the opportunity of proving their averments. (2 Barb. Ch. Pr. 317. *Brinckerhoff* v. *Brown*, 7 Johns. Ch. 216, 222, 223. *Dale* v. *McEvers*, 2 Cow., 118).

It is, therefore, admitted by complainant to be true, as stated in the answer, that complainant was not at the time of its application to be allowed to enjoy the privileges extended by the act of March 3, 1875, engaged in the business of a common carrier of passengers and freight, but was engaged at that time in the transportation of logs for the private use and benefit of the persons composing said complainant company, and that the action of the Secretary of the Interior on complainant's application was induced by complainant's false suggestions.

The bill does not contain a single allegation that complainant was exercising the public duty of a common carrier of passengers and freight at the time the order of January 29, 1889, was entered by the Secretary of the Interior, and the foundation on which the whole case of complainant rests is the contention that the right of complainant to enjoy the privileges of the act of March 3, 1875, is *res judicata* by the said order of January 29, 1889, and that this order can not be assailed collaterally by the defendants, and can only be impeached by a direct proceeding instituted for that purpose in the name of the United States.

It is not denied by complainant that the railroad com-

panies contemplated by the act of March 3, 1875, are such as exercise the public office of carriers for the public generally. This seems placed beyond doubt by section 3 of the act, which declares "that the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States *may be condemned*," and, failing such legislation, that "*condemnation* may be made in accordance with section 3 of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, etc.,'" approved July 2, 1864.

It is not to be supposed for a moment that Congress had any intention to invest private railway corporations with the exercise of the right of eminent domain provided for in this section.

It results, therefore, that the bill presents the bald case, that although it has come to the knowledge of Secretary Noble that complainant was not exercising the office of a common carrier at the time the order of January 29, 1889, was entered, and so was not entitled to the benefits of the act of March 3, 1875, the Secretary can not remove from the maps of the Land Department the line of definite location which was put there by means of complainant's false suggestions.

It is a truism that the Land Department can not dispose of a foot of the public lands without authority of law, and that any attempt to do so can be shown whenever and wherever a question is made as to the validity of such act.

It was impossible for Secretary Vilas to give himself jurisdiction by finding, upon the misleading evidence before him, that the complainant company was such a company as the act of 1875 contemplated. He had no authority under that law to make the order of January 29, 1889, *unless the fact was* as he upon the false evidence decided it to be. But the jurisdictional fact did not exist, and for that reason the order based on the mistaken belief of its existence was null and void, and, like any other nullity, had no force whatever, and, we conceive, may be properly treated by the Secretary as if it had never been.

Attorney-General Wirt advised that in a case where the Government had issued a patent to an assignor instead of an assignee, and the assignor would not surrender the patent, a new patent, containing an explanatory recital, might be issued to the assignee (2 Op., 41), and that conclusion was approved by Attorney-General Miller in his opinion on the question here involved (19 Op., 551,552).

It is true that the usual course is for the United States to file a bill in equity to have the void patent decreed to be such and to be surrendered for cancellation, because the Secretary of the Interior has no power to remove the cloud on the Government's title by requiring the surrender of the void patent. The practice, therefore, of not issuing a second patent for land covered by a former void patent is founded on expediency, it would seem, and *not on want of power*.

But in the case at bar not even the reason of expediency applies, because the complainant is not armed with a patent or any description of muniment, so that the re-

moval of its line of location from the public maps leaves it without even a color of right. Why, then, it may be asked, should the Government be driven to the circuitous proceeding of a suit in chancery in order to get rid of this intruder on its domain? This question seems to be answered satisfactorily by Attorney-General Miller in the opinion already referred to, where he says:

> It follows, then, that the application to the Department was for a purpose not authorized by law, and that the action taken in granting the application was void, it being perfectly clear that no disposition can be made of any part of the public domain without the authority of Congress. * * * To hold that the Department can not in this case cancel its approval and erase the line of the railroad from the public plats, but that the United States must go into a court of equity for that purpose, would seem to urge the conclusiveness of executive action to an unreasonable extent. The principle of *res judicata*, while to some extent applicable to the action of executive officers, has never been held to prevent an officer from reopening a matter in which he acted on a mistake of fact, or where new and additional evidence, which would justify a new trial or a rehearing, has been adduced. * * * In the case before me it is entirely practicable for the Department to remove the line of railroad from the public plats, both here and in the local land office, and thus, effectually, cancel the approval improvidently given. It is not necessary, in order to undo what has been done, to compel the company to surrender any paper for cancellation, because it is the public plats alone that need to be changed, and these are under the entire control of the Department of the Interior. * * * It would seem to be a useless circuity to have recourse to judicial proceedings to correct executive action in a case like the one in hand, where there is a concurrence of mistake of fact and want of power in the Department, and where the void proceeding is an obstacle in the way of the Land Office.

The question to be determined by this court is, whether the complainant can shelter itself under the principle of *res judicata* and defy the Secretary of the Interior in the face of its admission of facts which show it to be a trespasser and depredator on the public domain?

If it can, then the principle invoked would be a good defense for complainant if sued or indicted for its trespasses and timber depredations.

This question is therefore of importance, and its solution is looked forward to with interest by the Land Department.

THE PRINCIPLE OF RES JUDICATA HAS NO APPLICATION.

I.

BECAUSE THE SECRETARY HAD NO JURISDICTION.

No attempt will be made in this argument to deny that the rulings and acts of the Land Department of the Government, when within its powers, are, in some respects, controlling, and, when not controlling, protected against collateral attack.

At the same time, this court has steadily insisted that there are certain conditions of fact whose existence is vital to the jurisdiction of the Land Department, and the absence of which may be always shown in a collateral way for the purpose of overthrowing its most solemn acts, including patents.

This is felicitously stated by Mr. Justice Field, in delivering the opinion of the court in the case of *Smelting Company* v. *Kemp* (104 U. S., 636). He says:

> Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the land belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be *like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide.* Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, *and goes to the existence of a subject upon which it was competent to act* (p. 641).

The principle of *res judicata* was invoked, in the case of *Wilcox* v. *Jackson* (13 Pet., 511), in support of the position that the action of a register and receiver of public lands was conclusive on the point that the land in question in that case was open to preëmption entry; in other words, that the action of those officers was the determination of a competent tribunal that the particular land had not ceased to be public land, in the sense of the law, at the time it was entered. But the court held that no such effect could be given to the action of the land officers, because, if the land was not open to entry, such action was without jurisdiction and void, and that no determination to the contrary could take the place of the actual fact. The court said:

> Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable, would render that inquiry wholly unavailing. It is this, that the acts of Congress have given to the registers and receivers of the land offices the power of deciding upon claims to the right of preëmption; that upon these questions they act judicially; that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott et al.* v. *Peirsol et al.* (1 Pet., 340), in these words: "Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority its judgments and orders are regarded as nullities. They are not voidable, but simply void." Now to apply this. Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession and his cultivation during the preceding year, because these questions are directly submitted to them, yet if they undertake to grant preëmptions in land

> in which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum.

So, also, in the case of letters patent for inventions, they are *void*, unless certain preliminary conditions of fact exist, which are necessary to confer jurisdiction on the Commissioner of Patents. That officer can not, any more than the Commissioner of the General Land Office, by a determination of his own, preclude inquiry as to the existence of certain fundamental, jurisdictional facts, which this court say, in *Seymour* v. *Osborne* (11 Wall., 516, 540), are conditions precedent to the Commissioner's right to grant patents.

Mr. Walker in his work on Patents (§ 148) says:

> Patents are authorized by law, only on compliance with the statutory prerequisites to their issue. The Commissioner has therefore no jurisdiction to grant any patent, except where all those prerequisites have been substantially performed.

He further says, in the same section:

> But it is probably open to any defendant to defeat a recovery for infringement by pleading and proving that no drawing of the invention was filed in the Patent Office, and that the nature of the case admitted of drawings. This must be the law, *unless the Commissioner is the sole and final judge of this last point of fact; and it is not probable that Congress intended to make him so, for no such intention is expressed in the statute, and no such intention is consistent with public policy.*

Where the law creats a tribunal of special, stinted jurisdiction dependent on the existence of a certain fact or certain facts, and is silent as to whether the decision of the tribunal shall be conclusive as to the existence of such fact or facts, it must be determined, from the whole law, what was the legislative intent in this particular.

It would have been manifestly against public policy for this court to hold that the decisions of the land officers

that lands are open to entry should be controlling, and as manifestly against public policy for it to hold that the decisions of those officers as to compliance with the terms of the laws opening the public lands to settlement should not be controlling. The inconvenience likely to result from so holding no doubt induced the decision in *Wilcox* v. *Jackson*, and the cases that have followed it.

Coming now to the act of March 3, 1875, can it be supposed that Congress intended that any such condition of things should exist as has been brought about by the decision of the court below, which, if allowed to stand, disarms the Secretary of the Interior of authority to oust from the public domain an intruder who got there by a fraud practiced on his predecessor in office?

We do not believe that Congress intended that any action of the Secretary under the law based on false premises should produce the serious inconvenience of compelling the Government to resort to a court of equity for relief. And certainly no person or persons buying the complainant's railroad could possibly do so innocently, so far, at least, as its pretended servitude on the public domain is concerned, because such purchaser or purchasers must necessarily have had notice of the fact that complainant is not such a railroad company as the act of Congress had in view. It is apparent, therefore, that the contention of the respondents would not, if adopted, produce a public detriment, supposing, even, that railroads are bought and sold like quarter sections of land.

Indeed it is impossible to discover any inconvenience

to follow from the reading of the law contended for by the Government. If any such inconvenience should be suggested, it will be found, we venture to say, to be greatly outweighed by the inconvenience the United States would suffer if the meaning placed on the law by the learned court below should find countenance here.

But why should the Secretary of the Interior, with his limited power under the act, be held to be able to make jurisdiction for himself by his own finding when he possesses no such power in administering other land laws? Is it not more agreeable to reason to hold that Congress, in making this law, must have had in view the restrictive interpretation which this court had placed on previous laws investing the Secretary of the Interior with judicial authority over the public lands, and must have intended to adopt that interpretation?

There is a class of courts whose jurisdiction turns on the existence of some fact or facts, and whose judgments may be assailed collaterally by proving that in a given case, such fact or facts did not exist, *whether the court expressly found the contrary or not*, and it is not perceived that there is any good reason why the Secretary of the Interior should not likewise be forbidden to give himself jurisdiction by his own findings of fact.

In two cases this court has held that letters of administration were *void*, because in each case there was a duly qualified executor, and, consequently, there could have been no case before the probate court to set its jurisdiction in motion (*Griffith* v. *Frazier*, 8 Cranch, 9; and *Kane* v. *Paul*, 14 Pet., 33). In the first case Chief Justice

Marshall expressed the following views, which seem apposite to this case:

> To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still, the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. *Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point can not bring the subject within his jurisdiction.*
>
> The case of letters of administration granted on the estate of a person in full life, is not the only one which may serve for illustration; suppose administration to be granted on the estate of a deceased person whose executor is present, in the constant performance of his executorial duties. Is such an appointment void, or is it only voidable?
>
> In the opinion of the court it would be an absolute nullity.
>
> The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer these chattels to any other person by the grant of administration on them. His grant can pass nothing; it conveys no right, and is a void act.
>
> If the ordinary possesses no power to grant administration where an executor is present performing his duty, what difference can his absence make, provided that absence does not disqualify him from executing his trust? If all his powers as an executor remain, if he is still capable of appearing in courts of justice as the representative of the deceased, if he is still the legal owner of the chattels of the deceased, and still capable of disposing of them, it would seem that he is potentially present though personally absent. It is not easy to perceive any principle on which the ordinary can assert his power to take the estate out of the executor and vest it in an administrator. If he can not do this, then the attempt to do it must be a void act. If the administrator *durante absentia* be only the agent of the executor, it still occurs that the executor can himself appoint, and is the proper person to appoint, his own agent. There is no necessity for the intrusion of the ordinary. (Pp. 23, 24.)

In *Rose* v. *Himely* (4 Cr., 269) the same eminent judge remarked that "if by any means whatever a prize court should be induced to condemn as prize of war a vessel which was never captured, it could not be contended that this condemnation operated a change of property;" that is to say, the absence of the jurisdictional fact that there had been a capture could be shown wherever the sentence of condemnation should be relied on, despite the dignity of the tribunal that pronounced it.

In *Thompson* v. *Whitman* (18 Wall., 457) this court held that in an action in New York for the illegal seizure and condemnation of a vessel by the authorities of New Jersey for an alleged infraction of the oyster law of that State, it could be shown, in contradiction of the record in the condemnation suit in New Jersey, that the vessel was seized outside of the territorial jurisdiction of the court, and so that the judgment of condemnation was pronounced by a court without jurisdiction. See also *Broadhead* v. *McConnell* (3 Barb., 176); *Damp* v. *Town of Dane* (29 Wis., 432); *Mulligan* v. *Smith* (59 Cal., 229); *Peters* v. *Peters* (8 Cush., 529); *Jenks* v. *Howland* (3 Gray, 536); *Williamson* v. *Berry* (8 How., 495); *Allen* v. *Dundas* (3 T. R., 125); Brown on Jurisdiction, § 124; *United States* v. *Walker* (100 U. S., 258).

In *Bowman* v. *Russ* (6 Cow., 234), which was trespass against the overseers of the poor for the town of York, in Livingston County for breaking into plaintiff's house and seizing and taking away his goods, etc., the defendants justified under an order of two justices of said county under section 22 of an act for the relief and settlement of

the poor, which authorized the seizure of the property of a man for leaving his wife and children a charge upon the town. The plaintiff having traversed the averment in the plea that he had left his wife and children a charge upon the town, it was held, on demurrer, that it was open to the plaintiff to contest, collaterally, the matter covered by the traverse, as vital to the jurisdiction of the justices.

In *Terry* v. *Huntington et al.* (Hardres, p. 480) it was held that the decision of the commissioners of excise, under the statute of 12 Car. 2, c. 23, that certain spirits were strong wines, when in fact they were low wines, might be controverted for the purpose of overthrowing a justification based on the said decision, the commissioners being wholly destitute of jurisdiction as to low wines. Lord Hale remarked that they had no more jurisdiction than they would have had if they had adjudged "rose-water to be strong water." See also, to the same effect, *Perkins* v. *Proctor* (2 Wils., 382).

It is entirely settled that the sentence of a court-martial is always open to a side-wind attack to show that the person on whom the sentence was intended to operate had no military character. (*Wise* v. *Withers*, 3 Cr., 331; *Mills* v. *Martin*, 19 Johns., 7; *Rathbun* v. *Martin*, 20 *Ib.*, 343).

The following quotation from the opinion of Ellsworth, J., in *Sears* v. *Terry* (26 Conn., 273–285) seems to contain a correct generalization of the law bearing on the question in hand:

> The correct principle of law governing this class of cases we believe to be that where the legislature empowers a probate court, a board of overseers, a board of commissioners, the selectmen of the town, or the like, to divest a person of the ability to make contracts

and conduct and manage his affairs, under particular circumstances as prerequisites, and in a manner particularly described, these circumstances must actually exist and this manner of proceeding must be observed, and are both indispensable to the jurisdiction. They must be proved too, and if the records or papers show these facts, as is usual and proper, it is no more than *prima facie* evidence of their existence, and the person who afterwards comes to the knowledge of their supposed existence can deny and disprove them; otherwise he might suffer an irreparable injury. (*Leroy* v. *N. York*, 20 Johns., 430; *The People* v. *Brooklyn*, 23 Barb., 166; *Baugs* v. *McIntosh*, *Id.*, 602.)

It is hardly a matter of surprise that we have no test by which to determine whether the judgment of a tribunal is conclusive of a jurisdictional fact, as in the well-known case of *Britain* v. *Kinnaird* (1 B. and B., 432), which, however, was questioned by Bronson, J., in *ex parte* Clapper (3 Hill, 460), or whether the nonexistence of such fact may be shown collaterally, because it depends almost entirely on the legislative intention, as shown by the statute creating the court. The following instructive observations occur in the Notes of the American Editors of Smith's Leading Cases (Vol. 1, Pt. 2, pp. 1120, 1121, Ed. 1885):

The question is to a great extent one of legislative intention which can not be reduced to any general rule. If for instance a statute were passed authorizing a decree in bankruptcy against persons engaged in trade, a proceeding under it would present two points: First, is the party a trader; and next, did he commit an act of bankruptcy; and the legislature might obviously intend that the decree should be conclusive with regard to both, or only as to the latter.

Prima facie, a grant of judicial power implies a right to hear and determine all matters which are essential to the exercise of the power: *Evansville Railroad Company* v. *Evansville* (15 Ind., 395); *Vail* v. *Owen* (19 Barb., 22); *Angell* v. *Robbins* (4 R. I., 493); *Groenvelt* v. *Burwell* (1 Ld. Raym., 454, 467); but in *Perkin* v. *Proctor* (2 Wils., 382) the defendants were made answerable in trespass for proceeding under a commission in bankruptcy which had been issued at their instance against a person whose occupation did not bring him within the scope of the statute, and the authority of Lord Hale was relied on as showing that if a court whose jurisdiction is circumscribed as to place, as to person, or as to subject-matter, gives judgment in a cause arising in another place, or between other parties, or as to other matters, the whole will be *coram non judice* and void.

In like manner, a conviction under an authority to try and punish a particular class of workmen summarily may be set aside by proof

> that the accused does not belong to that class, but not that he did not commit the offense. *In re* Baker (2 H. & N., 219, 234, 240.) So a court-martial can not, under ordinary circumstances, subject a citizen to the pains and penalties of martial law by deciding that he is a soldier; although its decision that a soldier has committed an offense will be conclusive, and can not be overturned collaterally by evidence that he is really innocent. (*Smith* v. *Shaw*., 12 Johns., 257; *Wise* v. *Withers*, 3 Cr., 331; see *Bunbury* v. *Fuller*, 9 Exch., 111, 143, note; *Chew* v. *Holroyd*, 8 *Id.*, 247, 251, note; *Regina* v. *Bolton*, 1 Q. B., 66.)

We may well conclude what we have to say on this first proposition with the remarks of Mr. Justice Paine in the case of *Wanzer* v. *Howland* (10 Wis., 16):

> But I do not mean by this to say that the judgment of every tribunal as to its own jurisdiction is conclusive. That I have always denied. If a court decides that it has power to try a case and render a judgment, which by law it has not, such decision does not give it the power. Its judgment may be questioned anywhere for want of jurisdiction. But if a tribunal is authorized to act upon a certain state of facts, *and also to try whether the facts exist*, then if they are properly alleged before it, *and the parties are legally notified and have opportunity to contest them*, the finding of such a tribunal upon those facts would be the finding of a competent tribunal, and ought to be conclusive until reversed in a direct proceeding.

II.

BECAUSE THE ORDER OF JANUARY 29, 1889, WAS ENTERED IN AN EX PARTE PROCEEDING.

To make a thing adjudged there must be a contentious proceeding with plaintiff and defendant, which certainly can not be said of the application of the complainant company for the privileges of the act of March 3, 1875, which was essentially *ex parte*, thus placing this case on all fours with the case of *United States* v. *Minor* (114 U. S., 233).

That was a bill filed by the United States to cancel a patent which had been issued to Minor for land taken up by him under the preëmption law. The allegation of the Government was that Minor had not complied with the requirements of the preëmption law, and had by fraud and

misrepresentation procured the favorable action of the land officers.

The bill was dismissed on demurrer by the circuit court, but the Supreme Court held that the bill disclosed a valid case and that Minor was not protected by the adjudication of the land officers, because the proceedings before them were "wholly *ex parte*," in which he "had it all his own way," while the United States was "passive," opposing "no resistance to the establishment of the claim" and making "no issue on the statement of the claimant." "Surely," says the court, "the doctrine applicable to the conclusive character of the solemn judgments of courts with full jurisdiction over the parties and the subject-matter, made after appearance, pleadings, and contest by parties on both sides, *can not be properly applied to the proceedings in the Land Office in such cases*."

It would seem difficult to distinguish the proceeding described by the court in the above case from that carried on before Secretary Vilas. If the former was "wholly *ex parte*" the latter was also.

Minor's case and the case at bar are the converse of *Johnson* v. *Towsley* (13 Wall., 72), in which there was *an issue and a contest* on the facts between adverse parties in the land department, whose decision on the facts was held final.

Schurz's case (102 U. S., 378) was relied on below for the purpose of showing that the action of Secretary Vilas is wholly beyond the power of his successor, Mr. Noble. But the appositeness of that case to this is not perceived. In Schurz's case the Department of the Interior had juris-

diction and had attempted to undo a completed act done *within* that jurisdiction. It was a case of jurisdiction exhausted by the sheer force of its exercise, and when the Secretary attempted to recall his act he was already *functus officio*. But in the case at bar the Department *never had jurisdiction*. What Secretary Vilas did was a *nullity*. What Secretary Noble proposes to do *is to deal with it as a nullity*.

III.

BECAUSE THE ORDER OF JANUARY 29, 1889, WAS ENTERED UNDER A MISTAKE OF FACT.

Said Attorney-General Cushing (7 Op. 701), "when a thing is decided and done by the head of a department *acting within the scope of his lawful authority*, it can be revised by his successor only on the ground of mistake in a matter of fact, or the discovery and production of material new testimony," and the same doctrine seems to be laid down by this court in United States v. Bank of the Metropolis (15 Pet., 377, 401).

If this is a correct statement of the law by Attorney-General Cushing, it would seem to leave no room for doubt as to the legality of the position of Secretary Noble.

It is respectfully submitted that the decree appears to be erroneous and should be reversed, with an instruction to the court below to dismiss the bill.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN W. NOBLE, SECRETARY OF THE Interior, and Thomas H. Carter, Commissioner of the General Land Office, appellants,
vs.
THE UNION RIVER LOGGING RAILroad Company.

No. 1157.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

APPENDIX TO BRIEF FOR APPELLANTS.

ACT of MARCH 3, 1875, c. 152 (18 STAT., 482).

AN ACT granting to railroads the right of way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company

duly organized under the laws of any State or Territory, except the district of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of the articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

* * * * * * *

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned, and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said

office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved March 3, 1875.

147 U.S. 165

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CLERK.

IN THE

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JOHN W. NOBLE, SECRETARY OF THE INTERIOR, ET AL,
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vs.

THE UNION RIVER LOGGING RAILROAD CO.,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

S. F. PHILLIPS,
F. D. McKENNEY,
For Appellee.

"Nor (shall any person) be deprived of life, liberty, or property, without due process of law."—*Article V. Amendments.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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OCTOBER TERM, 1892.

No. 1157.

JOHN W. NOBLE, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS,

vs.

THE UNION RIVER LOGGING RAILROAD CO., APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

This is a bill for an injunction to restrain the Secretary of the Interior from carrying into effect a departmental order, dated June 2, 1891, purporting to cancel and annul a previously executed like order, dated January 29, 1889.

The contention is that under and by virtue of the latter order a property right has become vested in the appellee which cannot be divested without "due process of law," which phrase in such case contemplates JUDICIAL process as opposed to mere executive action.

While denying the competency of the Secretary of the Interior to pass such order as is here complained of, the right in the United States to investigate in a court of competent jurisdiction the charges preferred against the complainant company in this case is expressly admitted.

STATEMENT OF CASE.

The complainant below, appellee here, claims to have acquired a vested right in the property (right of way) against which the action of the Secretary of the Interior is aimed by virtue of compliance with the provisions of the act of Congress of March 3, 1875 (18 Stats., 482; sup., 2d ed., 91), and the order of January 29, 1889, upon the faith of which it has expended large sums of money.

The act referred to, so far as it is important in this case, is as follows:

"SEC. 1. That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road;

"Also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad;

"Also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

SEC. 2. [That occupation of any cañon by one railroad company shall not have the effect to exclude another such company therefrom, &c.]

SEC. 3. [That territorial legislatures may provide for the manner in which private lands and possessory claims on the public lands may be condemned.]

"SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said of-

fice; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

SEC. 5. [The act does not apply to reservations for Indians, &c.]

"SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act or any part thereof."

The allegations of the bill essential to this contention and admitted by the answer are that the complainant was created and organized as a railroad company under the laws of the then Territory, now State, of Washington upon the 20th of March, 1883 (paragraph 5, &c.); upon the 17th of August, 1888, its charter was amended and the duties of a common carrier were imposed upon it (paragraphs 5, 9, &c.); upon the 29th day of January, 1889, for purposes authorized by an act of March 3, 1875, it presented to Secretary Vilas and he "approved" its articles of incorporation and other papers, as required by sections 1 and 4 of that act (paragraphs 12, 13, and 14); upon the 13th of June, 1890, Secretary Noble made a rule upon the plaintiff to show cause why the above action of Secretary Vilas should not be annulled (paragraph 15); and after such cause, under protests against the jurisdiction, had been shown Acting Secretary Chandler made the rule absolute, and ordered that "the approval of the Secretary of the Interior, dated on the 29th day of January, 1889, of the map of definite location or profile of the Union River Logging Railroad Company be, and the same is hereby, annulled, canceled, set aside, and held for naught," and directod the Commissioner of the General Land Office "to carry out this order by causing it to be entered upon the appropriate plats and records of his office and the proper local land office" (paragraph 16). This order the defendants approve of and are about to carry out (paragraph 17).

While admitting the allegations of the bill, respondent alleges as the basis of the order of June 2, 1891, that—

"The complainant company *was not engaged in the business* of a common carrier of passengers and freight *at the time of its application* for admission to the privileges of the act of Congress of March 3, 1875, but was engaged *at that time* in the transportation of logs for the private use and benefit of the several persons composing the said company," and this becoming known to the present Secretary of the Interior "it was his right and duty to revoke and annul the action of his predecessor in approving the application of the complainant."

ARGUMENT.

Briefly to consider the provisions of the act of March 3, 1875 (*supra*), it is obvious that the *filing* spoken of in section one (1) as the particular action required to bring into being the statutory grant implies an *allowance* thereof by the Secretary as a condition precedent. A railroad company cannot by a mere act of its own, such as laying the necessary papers upon the Secretary's desk or depositing them in the departmental archives or the like, effect such a *filing* as would cause the statute to operate in its behalf.

It is also obvious that in authorizing the Secretary to "approve" a filing of papers properly submitted for the purpose of securing the benefits of the statute Congress made it his duty to consider and decide all matter incident thereto—*e. g.*, whether the applicant was "a railroad company" *within the meaning of the act* and whether the papers tendered for filing were a copy of *its articles of incorporation and due proofs of its organization.* When, therefore, the Secretary, acting under the provisions of this statute, approves the profile of the road "filed" with the articles of incorporation and due proofs of organization, it is to be conclusively presumed that he has

decided the above questions affirmatively. The acts done by him in the exercise of the authority and duly imposed by the statute are to be held valid and subject to reversal for cause shown, not by his successor in office, but only upon direct proceedings in courts of justice. To use words familiar in decisions affecting such cases the Secretary is by the terms of this act constituted a *special tribunal* as to the principal and all incidental questions involved in the application for its benefits. When once he has acted his favorable determination of the principal question makes an end thenceforth of all controversy as to both main and incidental matters *in the executive departments* (Steel *vs.* Smelting Co., 106 U. S., 447, 450), in which case it was said by this Court:

> The Land Department "was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained and to see that the requirements of the different acts of Congress are fully complied with. Necessarily, therefore, it must *consider and pass upon the qualifications of the applicant*, * * * *the nature of the land*, and *whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal* and is unassailable except by direct proceedings for its annulment or limitation."
>
> See also Smelting Co. *vs.* Kemp, 104 U. S., 636.

The language of this act contains neither reservation nor exception. ANY railroad company upon due compliance with its requirements, having received the "approval" spoken of, is entitled to its benefits.

Denver & R. G. R. R. Co. *vs.* Alling, 9 Otto, 463, 478, 479.

Some stress is laid by counsel for the Government upon the fact that by the method of trial pursued below the complainant must be taken to have admitted the allegation of the answer to the effect that—

"The complainant company was not *engaged in the business* of a common carrier of freight and passengers *at the*

time of its application for admission to the privileges of the act of Congress of March 3, 1875, chapter 152, but that it was engaged *at that time* in the transportation of logs for the private use and benefit of the several persons composing the said company."

While the rule applicable to pleadings as evidence in such case may be admitted to be correctly stated, it is to be said that in such case nothing is to be taken against the complainant by intendment. The effect of the admission claimed cannot be extended beyond the scope of the words in which the allegation is cast. This being so, it is to be noted it is not alleged in the answer to the bill that the complainant company is not incorporated as a common carrier; on the contrary, such is expressly admitted to be the fact, nor is it alleged that at the date of Secretary Vilas' approval (January 29, 1889), at which date and not before the rights and privileges claimed by the company and its reciprocal obligations attached, and ever since that time it has not been "engaged in the business of a common carrier of freight and passengers." It is not perceived how an admission that at some time anterior to the vesting in the company of any rights claimed under the statute the fact that it may not have been actually "engaged in the business" imposed upon it by its charter can affect the merits of this controversy.

2.

During his term of office Secretary Vilas was charged with the due administration of the act here in question and with the supervision of all applications for right of way made under it. How can it be reasonably said that he was without jurisdiction to consider the application of the Union River Logging Railroad Company? It is and was then a railroad company duly organized under the laws of

the Territory of Washington. Its charter imposed upon it the duties of a common carrier. The papers which it submitted for filing were in due form and wholly fulfilled all the statutory and departmental requirements. The lands crossed by the line of the road were subject to the grant, and the Secretary, under the provisions of the law, was authorized to dispose of them. Every single element necessary to the jurisdiction was present. Not one was lacking. Whether the applicant was a "railroad company" within the contemplation of this statute was a fact with the determination of which, prior to noting his "approval" upon the profile map of the road, the then Secretary was especially charged.

The attitude in which respondent now places himself before the Court is that while alleging the right and duty in himself of ascertaining and determining whether the complainant is a railroad company within the purview of the act in question he insists that his predecessor, clothed with equal dignity and power, was without jurisdiction in the premises. The right to investigate, to hear, and determine necessarily presupposes the existence of jurisdiction. If Secretary Noble has jurisdiction under the circumstances here to pass upon the qualifications of this railroad company, *a fortiori* Secretary Vilas was certainly possessed of the same power. The fact that Secretary Noble would have disapproved where Secretary Vilas approved cannot at all affect the fundamental question of jurisdiction. Secretary Vilas while in office was charged with the general administration of this statute. The duty imposed upon him of determining whether an applicant was entitled to the benefits conferred necessarily presupposes the existence of jurisdiction, and this not alone in the case of a *bona fide* applicant, but in every case under the statute which came before him.

The fact that an applicant other and different from that contemplated by the statute claims the benefits of its provisions cannot of itself operate to oust the jurisdiction.

It is the duty of the then existing Secretary to judge of the qualifications of each applicant for the rights conferred by the statute as it comes before him.

Whether his judgment be correct or not, still it is his judgment, and when exercised upon such an application it is exercised upon a subject cognizable in his court.

If he erred in his decision or was imposed upon or acted upon a mistake of fact his decision is perhaps voidable; it is certainly not void.

In the case of Griffith *vs.* Frazier (8 Cranch, 9), so greatly relied upon by opposing counsel, it is said by Chief Justice Marshall, when commenting upon the jurisdiction of the ordinary to grant letters of administration in certain cases:

"The fact that he (the ordinary) grants letters of administration in cases not expressly authorized by statute and in which a will exists in which an executor is named *proves of itself that he has jurisdiction* in such cases, and if he grants administration in one of them improperly the judgment is erroneous and voidable, but not void."

The *infirmity* in the argument for respondent consists in not distinguishing between cases wherein the judgment attacked is a judgment of a tribunal having cognizance of the subject-matter, and the judgments of tribunals not having cognizance thereof. The cases cited in his argument are all of the latter sort.

The subject-matter in controversy between the Secretary and the railroad company is the right of way and attendant privileges granted by the act of March 3, 1875. That Secretary Vilas was constituted a tribunal having cognizance thereof cannot be denied.

If his judgment in the premises was erroneous or was procured by fraud it is not void, but voidable merely; for, as was said by MARSHALL, Chief Justice, in Simms *et al. vs.* Slocum (3 Cranch, 301):

"The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void, and therefore all acts performed under them are valid so far as respects third parties. * * * All the legal consequences which follow a judgment are, with respect to third persons, precisely the same in one obtained by fraud as if it had been obtained fairly."

And so contracts induced by fraud are not void, but only *voidable* at the election of the party defrauded.

Kerr on Fraud, p. 48.

So we contend with confidence that when the complainant company fully complied with all the statutory and departmental requirements by filing its articles of incorporation and due proofs of organization, together with the other papers enumerated, and the Secretary of the Interior approved the profile map of its road, the grant of the right of way with its attendant privileges became VESTED.

3.

Whether this grant of a right of way is a grant of the fee in the land or whether it be merely the grant of an easement is immaterial, for in either case it is a grant of PROPERTY.

Johnson *vs.* R. R. Co., 116 Ills., 521, 525; Story, J., in Dartmouth College case, 4 Wheat., 700.

As a grant of property it is entitled to the full protection guaranteed by the Constitution of the United States.

The grantees cannot be deprived of it without "due process of law."

Amendments, Art. V.

This amendment has been declared to be a limitation upon the powers of the Government in its dealings with the citizen, and to relate to that class of rights whose protection is peculiarly within the province of the JUDICIARY.

U. S. *vs.* Lee, 16 Otto, 195, head note.

Truly interpreted, it guarantees that rights properly acquired by the citizen under existing law are beyond the reach or power of any branch of the Government, but where acquired and held *contrary* to existing law they may be taken away, not by an act of the legislature or of the executive, but by the due administration of the law itself before the judicial tribunals of the State.

Paschal, 3d ed., n. 257, p. 260.

Wynehamer *vs.* The People, 13 N. Y., 378, 392, *et seq.*

4.

So far as it operates to vest a property right the approval of the profile map of the road filed by the company and the notation thereof on the public plats differs in no essential particular from the signing, sealing, and recording of a patent, for where the granting act contains no provision for the issuance of a patent the certificate of the Secretary of the Interior conveys as complete a title as though a patent had issued.

Frasher *vs.* O'Connor, 115 U. S., 102, 116.

Notwithstanding the charge of fraud in its procurement, a patent for land once issued "cannot be vacated by the (land) officers themselves; their power over the land is

ended when the patent is issued. This can only be *accomplished by regular judicial proceedings.*"

Steele *vs.* Smelting Co., *supra.*

Jackson *vs.* Lawlor, 6 Am. Dec., 311; 10 Johns. (N. Y.), 23.

State *vs.* Bachelder, 80 Am. Dec., 410; 5 Minn., 223.

If the department is helpless without the aid of the judiciary in the case of a patent issued, so also must it be in the case of a grant with respect to which the last necessary act has been performed—*e. g.*, under the act of March 3, 1875, when the Secretary has "*approved*" the profile map of the road.

The United States, without making compensation, cannot take back what they have granted nor defeat a vested right arising from any source.

Sinking fund cases, 99 U. S., 718.

Hepburn *vs.* Griswold, 8 Wall., 603, 624.

"The Government has no power to revoke a grant, even of its own funds when once given to a private person or a corporation for special uses. The only authority remaining to it is *judicial* to ascertain the validity of the grant, to enforce its proper use, and to suppress frauds.

Dartmouth College case, 4th Wheat., 698.

That this must be so is plain, for to justify the extinguishment of vested rights there must first have been a forfeiture, to adjudge and declare which is unquestionably the province of the judiciary.

From the foregoing it follows that the charge of fraud in the procurement of this grant, even if taken as admitted, would not confer upon the Secretary of the Interior jurisdiction to adjudge and declare a forfeiture. A charge of fraud

is a matter *inter partes*. When made, justice demands that both sides be accorded a full hearing before the properly constituted judicial tribunals. As well might an individual endeavor to recall the title to property yielded by a deed fraudulently induced as a Secretary of the Interior to endeavor to resume control of a grant created by his own act.

Private property is sacred *upon its own account*, irrespective of this or that legal method by which it has been *purchased* or *inherited*. A "right of way" vested under the very simple provisions of the act in question is, as a matter of course, equally sacred with the right to the Comstock lode obtained, say, at the close of a long series of statutory and executive transactions.

Nor is the comparative stability of several titles affected by the circumstance that, as in the present case, the proof of the title is to remain in the department of the officer whose act invested it with life, whilst in another it may be in the form of a patent locked up in the safe of its owner. In the former case, after creating the title by the "approval" of the profile map, same having been noted upon the public plats, the officer, like a probate judge as to *wills* which have been established before him, loses all *function* thereabouts save that of custody.

The want of power in an executive officer under our form of government to recall any completed act, *even of his own*, that has resulted in creating *private property* appears to be so well established as to render it unimportant here to do more than allude to the *additional* circumstance that in the present case the completed act in question was *not his own*, but that of a *predecessor*—a circumstance which, as is familiar, has an independent effect in prohibiting such action. (See Mullen *vs.* United States, 118 U. S., 271, 279, and the cases there cited.)

In that case a former Secretary of the Interior, acting under the school grants to California, from which "mineral lands" were excluded, *certified* to the State certain known coal-bearing lands, he being of opinion that "coal lands" were not "mineral lands" within the meaning of the granting act. No patents issued.

This Court held otherwise, saying, "The list (of lands) was certified *without authority of law*, and therefore by a mistake against which relief in equity may be afforded."

"The patent (certificate) is but evidence of a grant, and the officer who issues it acts ministerially and not judicially, * * * *but one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.*"

There the case turned upon the character of the subject-matter of the grant. In Steel *vs.* Smelting Co., *supra*, the decision turned in a great measure upon the *qualifications* of the grantee, and it is to be noted that in both cases the action of the land officers was based upon mere *ex parte* proceedings, a circumstance upon which counsel for the Government relies as in some occult way operating to give to the land officials greater latitude and power when seeking to destroy a right so founded.

In Moore *vs.* Robbins (96 U. S., 530) the rule was distinctly stated as follows:

"When a patent for land is delivered to and accepted by the party the title of the Government passes with the delivery. With the title passes away all authority and control of the executive department over the land *and over the title which it has conveyed*. It would be as reasonable to hold that any private owner of land who has conveyed it to another can of his own volition recall, cancel, or annul the instrument which he has made and delivered as to suppose that the United States could recall a patent. If fraud, mistake, error, or wrong has been done the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed of conveyance

as to individuals, and if the Government is the party injured this is the proper course."

The statement is as applicable to cases where the title has vested by certification or "approval" as by patent.

What has otherwise been said above is believed to justify us in submitting the following extracts from the opinion of Mr. Justice Miller in the case of Schurz, 102 U. S., 378, 400–402, as germane to our contention, and if *germane*, then *conclusive*.

That was a case which involved a question of the power of the Secretary of the Interior over a patent for land which, having been signed and sealed, had remained in his hands, a collateral contest pending contemporaneously in the Department as to the right of the patentee to make the homestead entry upon which the patent had been founded having apparently been for some time overlooked, but being brought again to mind before the patent had actually been parted with, the Secretary, after reconsideration, was led to order the patent to be cancelled. The form of action was *mandamus* to compel a surrender of the patent:

"It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is therefore void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

"We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

"But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction, on which valuable rights often depend; and the case before us is one to which we think it is clearly applicable. To the officers of the Land Department, among

whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry, and sale. The question whether any particular tract belonging to the Government was open to sale, pre-emption, or homestead right is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such a question and of conflicting claims to the same land by different parties is judicial in its character.

"It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary.

"They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent; but such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

"The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside or correct it, if only partly wrong. It was within the province of those officers to sell the land and to decide to whom and for what price it should be sold; and when, in accordance

with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly executed patent, that instrument carried with it the title of the United States to the land.

"From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the Government, or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee any more than the burning up of a man's title deeds destroys his title. What is the final act which closes the transaction?"

The eminent Justice thereupon proceeds to state the details of the official action which the statutes authorizing the transaction there in question had required from the series of officers charged therewith, and concludes (p. 403):

"We are of opinion that where all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee and with it the right to the possession of the patent."

We submit that no one can read the above opinion and doubt that the Court would have applied its argument and conclusions as well to the case of a short statute, comprising brief details for vesting private property, as to that statutory series and complication of matters then before it.

And equally it is plain that in that case no reliance was

placed by the court upon the special details which characterized the status of the *patent* whilst in the hands of the department, viz., as having been at different times in the posession of this or that one of its subordinates, whether within the city of Washington or without. The court plants itself firmly and distinctly upon the principle that, *from the very nature of the functions of those officers whose favorable action results in the transfer of a title from the United States to a private person, the authority of such officers in the matter ceases, at the latest, precisely when the last act in the series essential to the transfer of title has been performed.* (Page 402, paragraphs 2, 3.)

Under the act of 1875, therefore, the "*filing*" of the articles and proofs of organization—at all events when accompanied by the approval of the profile map—rendered the Secretary *functus officio* in regard to the transfer of title in question, and thereafter the railroad company possessed the same constitutional guarantees of that title which any other private person under our form of government possesses as to his own.

At the same time the company freely admits that it is amenable to the same scrutiny of the methods by which that title was obtained as any other person would be, and upon having a day in court allowed it will maintain its own general competency as an applicant for the right of way and also its *bona fides* in other respects.

Whilst the above line of defense is believed to be the true one, and also to be complete, it will be observed that other paragraphs of the bill state the whole case of the railroad company just as if it were now being presented to the Secretary upon an original application for a right of way. Although this detail seems superfluous, we may remark that, inasmuch as that application was made after the *amendment* to the charter in 1888, the contention that the applicant was a *private* incorporated railroad company, as suggested in the

opinion of Secretary Chandler, was a matter not to be decided by the details of its *original* articles, and that under its *amended* articles it was a *public* railroad company, a character in all cases to be determined, of course, by a consideration of the powers and duties given and imposed upon any company *by its charter* and not by that of the extent to which by any alleged neglect of said company those powers and duties may have been *practically* disused. Indeed, it is not intended by the act of 1875 that a Secretary when called upon to give effect to the statutory grant of a right of way shall have had an opportunity of seeing how the applying corporation *makes use of* its charter privileges, for the action required of him thereby necessarily *precedes* such use. When he deals with a company it has been only *chartered* and *organized* with a proposed definite way. The remedy for any *mala fides* that might succeed in escaping the attention of the Secretary whilst exercising his official function of "approving" was, no doubt, "forfeiture" as the result of judicial proceedings or (as the matter for which section 4 expressly reserves that remedy) also under some *legislative proceeding.*

Schulenberg's case, 21 Wall., 44, 63.

But, as already submitted, the question whether under either charter this railroad company was entitled to the grant in question was only submitted by the statute to such Secretary as might be in office at the time when it arose, and this has been *conclusively* decided by that gentleman, except for such preceedings as may hereafter be advised to be promoted by the United States in some court of justice.

AS TO THE RELIEF SOUGHT.

This company, having established its property right in the subject-matter of this controversy, is entitled to the most ample protection guaranteed by the law, and when this plain right is threatened, as here it is threatened, by some positive official act the party to be injured is justified in applying for an injunction to prevent the act and to restrain the injury.

Board of Liquidation *vs.* McComb, 92 U. S., 531.

The Constitution (amendments 5th article) does not define the extent of the *deprivation* prohibited by it.

Munn *vs.* Illinois, 94 U. S., 113, 123, *et seq.*

It applies, however, wherever the act to be done will render the thing less useful or valuable.

Wynehamer *vs.* People, 13 N. Y., 378, 396, *et seq.*

Pumpelly *vs.* Green Bay Co., 13 Wall., 166, 177.

Acts in derogation of plaintiff's title and calculated to injure it in that respect will be enjoined, although no damage actually happens. Courts will restrain illegal acts which, if completed, will necessarily cast a cloud upon title *and naturally diminish its value.*

De Witt *vs.* Van Schoyk, 110 N. Y., 7; 6 Am. St. Reps., 342.

When a public officer assumes powers over property which do not belong to him, and infringes upon or violates the rights of a citizen under pretense of such assumed authority, equity has jurisdiction to interfere by injunction.

Kerr on Injunc., sec. 1309.

"Possession under color of title is ground enough to enjoin and to continue the injunction till it is proved at law (in a proper action) that it is only color and not real title."

Lord Eldon in Universities of Oxford and Cambridge *vs.* Richardson, 6 Vesey's Ch. Rep's, 1st Am. ed., p. 707.

There is no necessity to inquire curiously into the exact extent to which the threatened action in question may injure the private property which it attacks; it is enough that it is calculated to throw a cloud upon its title. In intention and in form the order is to go to the heart of the "approval," considered as an *essential element* in the grant of the right of way. The rule upon which it is based called upon the railroad company to show cause why the "approval of its articles, etc., should not be revoked and annulled" (bill, paragraph 15), and the order itself adjudges that approval to "be hereby annulled, canceled, set aside, and held for naught," and directs the Commissioner "to carry his order out by causing it to be entered upon the appropriate plats and records of his office and the proper local land office. (Paragraph 16.)

It is to be assumed here that the action threatened will answer its ends and destroy, or at least impair, the usual evidence of the grant, just as was intended by the cancellation of the patent in Schurz's case. The circumstance that the cancellation of the patent in that case did not annul the title previously vested in McBride did not prevent relief by ordering another one to issue sanctions the position that a court of equity, if seasonably invoked, would have interfered to *prohibit* such cancellation. All persons are entitled to have any record, or paper, or entry by which their title is authenticated preserved undefaced and undisparaged within that custody to which by law it has been assigned, any general "control" by the Secretary of the records of his depart-

ment being, as already said, subject to obvious exceptions in favor of particular records that are evidence of title for private persons.

The fact of the pendency in the department at the time of filing the bill of complaint herein of a motion for review is suggested in the answer of respondent and noticed in the brief of opposing counsel. The cursory as well as very informal character of this allegation makes it doubtful if it be at all relied upon. However, if it be admitted as substantially a declinatory plea of "another suit pending," it appears to violate the maxim which prohibits *exceptio ejusdem rei cujus petitur dissolutio*; for the *jurisdiction* of the department over the "former suit," so suggested as pending before it, is the very matter questioned by the present bill and made the ground of its prayer for relief; and, further, one necessary element to the strength of such plea, viz., that the plaintiff in the second suit must also have been *plaintiff* in the former, is not supplied by the circumstance suggested here—that is, that although the present plaintiff was originally defendant in the former proceeding, he has, nevertheless, by *having made a motion for a review* of an adverse decision therein, converted himself into plaintiff.

See also Mitford's Pleading (Jeremy), pp. 236, 246, notes I and K.

Thomas H. Carter, having resigned as Commissioner of the General Land Office, this suit as to him must be held as abated; but the order sought to be enjoined is the order of the present Secretary of the Interior. The acts of the Commissioner in such case are but the acts of a subordinate without volition in the premises. The relief sought will be fully covered by continuing in force the decree as to the remaining party now before the Court.

With the possible modification suggested, it is submitted the decree should be affirmed.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Appellee.

157

147 U.S. 165

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN W. NOBLE, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS,

vs.

THE UNION RIVER LOGGING R. R. CO.

SUPPLEMENTAL BRIEF FOR APPELLEE.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it."

"The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives for the protection and enforcement of that right."

"Courts of justice are established not only to decide upon

controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government." Mr. Justice Miller in United States *vs.* Lee, 106 U. S., 195.

"The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Marshall, C. J., in Marbury *vs.* Madison, 1 Cranch, 164.

That the courts will not interfere with the President or the heads of departments in the performance of duties of a political or discretionary nature is settled.

It is equally well settled that *mandamus* will lie to compel the performance of duties of a mere ministerial character, in which there is no room for the exercise of discretion, official or otherwise.

Marbury *vs.* Madison, *supra.*

Kendall *vs.* U. S., 12 Peters, 524.

McBride *vs.* Schurz, 102 U. S., 378.

The doctrine enunciated is as applicable to the writ of injunction as it is to the writ of *mandamus.*

Gaines *vs.* Thompson, Sec'y, 7 Wall., 347.

In this case no doubt was expressed by the court of its power to enjoin the Secretary of the Interior in a proper case.

See also Litchfield *vs.* Richards, register, 9 Wall., 575.

In both of the cases last cited the application for injunction was denied on the ground that the title to the property in dispute had not passed from the control of the Land Office.

The rule was concisely stated by the late Justice Bradley as follows:

"It has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, *may have an injunction to prevent it.* In such case the writs of *mandamus* and injunction are somewhat correlative to each other."

B'd of Liquidation *vs.* McComb, 92 U. S., 531.

In applications of this character the determining point is, whether the officer sought to be restrained is acting within the scope of his authority or whether he is transcending that authority.

If public officers assume powers over property which do not belong to them, and infringe upon or violate the rights of citizens under pretense of such assumed authority, equity has jurisdiction to interfere.

High on Injunctions, sec. 1309.

Mechem on Public Officers, secs. 995, 996, and 1326, and cases there cited.

Executive officers are amenable to summons and process as other citizens. Even the President is not exempted. (Marshall, C. J., in the case of Aaron Burr; *Causes Célèbres*, vol. 1, p. 176.) There can, therefore, be no indignity in laying upon him or them in proper cases the writ of injunction.

The right of the courts to issue such writ upon a proper showing is ably presented in the argument of counsel submitted in the case of Mississippi *vs.* Johnson, President, &c., 4 Wall., 475.

In Ellis *vs.* Earl Grey (6 Simons, 215) the High Court of Chancery did not hesitate by writ of injunction to restrain the Lords of the Treasury from paying compensation in a certain case, holding that the act enjoined was merely ministerial.

See also—

The People *vs.* Canal Board, 55 N. Y., 390, 393.

Attorney General *ex rel.* Tindal *vs.* Magistrates, 2 Myl. and Cr., 123.

It is not by the office of the person to whom the writ is directed, but the *nature of the thing intended to be done*, that the propriety of issuing the writ is to be determined.

If injunction will lie to restrain the performance of ministerial acts embraced within the jurisdiction of the official complained of, can it be doubted that the remedy extends to the prevention of contemplated acts clearly outside of such jurisdiction?

If the Secretary of the Treasury should take steps to issue greenbacks in excess of the amount contemplated by

law, would the courts upon application made by the parties in interest be powerless to interfere?

If the Secretary of the Interior, convinced that our pension system was an intolerable burden imposed upon the community at large, should order the destruction of the pension rolls, is there no power to prevent such spoliation?

If the Secretary of the Interior has not the legal right to destroy the pension records, by what peculiar operation of law can he be supposed to have the legal power to destroy the record of the title claimed to have vested in complainant here?

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